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Title: City of Chicago, et al., Petitioners
v.
International College of Surgeons, et al.

Docketed:
December 9, 1996

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Rosenthal,Lawrence

Counsel for respondent: Anderson,Kimball R.

Entry	Date	Note	Proceedings and Orders
1	Dec 4 1996	G	Petition for writ of certiorari filed. (Response due January 8, 1997)
2	Dec 23 1996		Waiver of right of respondents International College of Surgeons, et al. to respond filed.
3	Jan 22 1997		DISTRIBUTED. February 14, 1997 (Page 28)
4	Feb 4 1997	F	Response requested -- AS.
5	Mar 6 1997		Brief of respondents International College of Surgeons, et al. in opposition filed.
6	Mar 14 1997		Reply brief of petitioners City of Chicago, et al. filed.
7	Mar 19 1997		REDISTRIBUTED. April 11, 1997 (Page 1)
8	Apr 14 1997		Petition GRANTED. SET FOR ARGUMENT October 14, 1997. **********
10	May 5 1997		Order extending time to file brief of petitioner on the merits until June 12, 1997.
11	May 29 1997		Joint appendix filed.
12	Jun 12 1997		Brief of petitioners City of Chicago, et al. filed.
13	Jun 12 1997		Brief amici curiae of National Trust for Historic Preservation, et al. filed.
14	Jun 12 1997		Brief amicus curiae of Indiana filed.
15	Jul 11 1997		Brief amicus curiae of Defenders of Property Rights filed.
16	Jul 17 1997		Brief of respondents International College of Surgeons, et al. filed.
17	Jul 28 1997		CIRCULATED.
19	Aug 18 1997	X	Reply brief of petitioners City of Chicago, et al. filed.
18	Aug 19 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Seventh Circuit.
20	Oct 2 1997		Letter from counsel for the respondent received and distributed.
21	Oct 3 1997		Record filed.
		*	Original record proceedings United States District Court for the Northern District of Illinois.

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No.——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,
v.
INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a lawsuit containing claims that a local administrative agency's decision violates federal law, but also containing state-law claims that are not reviewed de novo, is a "civil action" within the original jurisdiction of the federal district courts.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago, the Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Friedman, Seymour Persky, Larry Parkman, Joseph F. Boyle, Jr., and Cherryl Thomas.* The respondents are the International College of Surgeons, the United States Section of the International College of Surgeons, Robin Construction Corporation, 1500 Lake Shore Drive Building Corporation, and the North State, Astor, Lake Shore Drive Association.

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* Two petitioners—Joseph F. Boyle, Jr. and Larry Parkman—were not named as defendants-appellees below, but were automatically made parties by virtue of Fed. R. App. P. 43(c).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. ——

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, the City of Chicago, its Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Friedman, Seymour Persky, Larry Parkman, Joseph F. Boyle, Jr. and Cherryl Thomas, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-25a is reported at 91 F.3d 981 (7th Cir. 1996). The opinions of the district court, App., *infra*, at 26a-96a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. A timely petition for rehearing was denied on November 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367 provides, in pertinent part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> . . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1441(a) provides, in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . . .

STATEMENT

The International College of Surgeons and the United States Section of the International College of Surgeons (collectively "ICS") own two parcels of land on North Lake Shore Drive in the City of Chicago. App., *infra*, at 2a. In July 1988, the Commission on Chicago Historical and Architectural Landmarks (the "Landmarks Commission") made a preliminary determination that seven buildings in that area, including the two mansions on the properties at issue, satisfied the criteria for designation as a landmark district under the Chicago Landmarks Ordinance. *Id.* at 3a. On June 28, 1989, the Chicago City Council accepted this determination and passed an ordinance creating a landmark district that included these properties. *Ibid.*

In February 1989, after the Landmarks Commission's preliminary determination but before the City Council had acted, ICS executed a contract for the sale and redevelopment of the property, calling for the demolition of all but the facades of the mansions and the construction in their place of a forty-one story condominium building, contingent on ICS's ability to obtain all necessary permits and approvals. App., *infra*, at 3a. Robin Construction Corporation acquired the developer's interest later in 1989. *Ibid.* ICS applied for demolition permits, and on January 9, 1991, the Landmarks Commission denied its applications for permits. *Ibid.* On February 13, 1991, ICS filed a lawsuit in the Circuit Court of Cook County, Illinois, seeking judicial review of that decision, and the defendants re-

moved the case to the United States District Court for the Northern District of Illinois. *Ibid.* The district court denied ICS's motion to remand the case to state court, concluding that ICS's complaint had raised federal questions and accordingly was within the scope of federal removal jurisdiction under 28 U.S.C. § 1441. App., *infra*, at 94a-95a.

On February 8, 1991, ICS filed an application under the economic hardship exception in the Landmark Ordinance seeking the Landmarks Commission's approval for the issuance of demolition permits. App., *infra*, at 4a. The Landmarks Commission also denied this request, and ICS then filed a second action in state court again seeking judicial review. *Ibid.* The defendants removed this action as well to the district court. *Ibid.*[1]

In the two consolidated actions challenging the determinations of the Landmarks Commission, the district court granted the defendants' motion for summary judgment, holding that the Landmarks Commission's refusal to approve issuance of the demolition permits was consistent with the United States Constitution, the Illinois Constitution, and the Landmarks Ordinance. App., *infra*, at 89a. ICS then appealed.

On appeal, the Seventh Circuit reversed and ordered the cases remanded to state court. The court of appeals

[1] ICS also sought approval of its redevelopment plan from the Chicago Plan Commission, as required under Chicago's Lakefront Protection Ordinance, but after a public hearing, the Plan Commission refused to approve the plan. App., *infra*, at 4a. ICS then sought an amendment to the Chicago Zoning Ordinance permitting the proposed development, but the Chicago City Council refused to approve the amendment. *Ibid.* ICS then filed a third suit, this time in federal district court, seeking review of these determinations under both federal and state law. *Ibid.* The district court stayed this third action pending its disposition of the two actions that had been removed from state court, *ibid.*, and later dismissed the case as moot, app., *infra*, at 92a-93a. That third case is not at issue in this petition.

began by noting that removal jurisdiction exists over any "civil action brought in a State court of which the district courts of the United States have original jurisdiction." App., *infra*, at 6a-7a (quoting 28 U.S.C. § 1441(a)). This inquiry, in turn, depends on whether "the action originally could have been brought in the district court." *Id.* at 7a. In this case, the district court had ruled that ICS's complaints were within federal question jurisdiction because they alleged that the Landmarks Commission's decision violated the United States Constitution. The court of appeals agreed that "a state judicial proceeding to conduct de novo review of a state's administrative decision is a 'civil action[] . . . of which the district court has original jurisdiction' within the meaning of 28 U.S.C. 1441(a)." *Id.* at 11a (brackets and ellipsis in original). The court concluded, however, relying primarily on *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), and *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995), that there is no civil action when "the state administrative review scheme provides for deferential review of a state agency's decision." App., *infra*, at 11a. In such cases, deferential review "would require the district court to perform an appellate role," which was "a function that could [not] be described as a 'civil action' within its original jurisdiction . . . ." *Id.* at 14a.

The court of appeals then analyzed Illinois law to determine what type of review the state court would have given to ICS's claims. Generally, Illinois law requires courts to apply a "deferential standard of review" to administrative decisions. App., *infra*, at 18a-19a. Illinois law recognizes, however, that an action seeking review of an agency's decision can include an "attack on the facial validity of the statute," which "would be considered an original action that raised a federal question and was therefore subject to removal to the district court." *Id.* at 19a. Illinois law also recognizes that a plaintiff aggrieved by an administrative decision can attack a statute's con-

stitutionality as applied to its own case and that "[s]uch a claim is independent of the administrative review proceeding and is therefore plenary in its scope; the court is not confined by the administrative record." *Id.* at 20a. Thus, such claims also "would allow removal to the federal court." *Ibid.* This case was a hybrid: ICS has brought "facial attacks on the validity of the statute, allegations of unfairness of a federal constitutional dimension, and claims based on state grounds that . . . must be adjudicated on the basis of the administrative record." *Ibid.* (footnote omitted). Accordingly, this case presented the question "whether, when the state action involves both claims that, if brought alone, would be removable to federal court with issues that clearly are grounded in the administrative record, removal of the entire state action to the district court is possible." *Ibid.*

On this issue, the court of appeals looked to its prior decision in *Francis J. v. Wright*, 19 F.3d 337 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994), in which the court had refused to allow removal of a state-court complaint containing claims barred by the Eleventh Amendment as well as claims that were within federal jurisdiction. *Francis J.* had read Section 1441(a) as " 'only authoriz-[ing] the removal of *actions* that are within the original jurisdiction of the federal courts.' " App., *infra*, at 21a (emphasis in original) (quoting *Francis J.*, 19 F.3d at 340). Here, because ICS's state-law claims seeking judicial review of the administrative record were not within the district court's original jurisdiction, the court of appeals held that the case "cannot be termed a 'civil action . . . of which the district courts . . . have original jurisdiction' within the meaning of Section 1441(a)." App., *infra*, at 22a. And, according to the court, Section 1441(c) did not alter this result. Although that statute permits removal of otherwise non-removable claims when joined with claims within federal-question jurisdiction,

Section 1441(c) "presuppose[s] the existence of a 'civil action.' " *Ibid.*[2]

REASONS FOR GRANTING THE PETITION

The court of appeals held in this case that the presence in a complaint of state-law claims over which a court would not exercise de novo review makes a lawsuit something other than a "civil action" and hence non-removable even if the suit also contains claims unquestionably within federal-question jurisdiction under 28 U.S.C. § 1331 because they allege that the agency's decision violated the United States Constitution. This issue merits plenary review by this Court. This issue has arisen in other circuits, which have resolved it inconsistently. This conflict is particularly intolerable on a jurisdictional issue, which creates enormous uncertainty about subject-matter jurisdiction over litigation in those circuits that do not follow the rule embraced below as well as in circuits that have not addressed the issue. In addition, this decision creates a substantial and unwarranted restriction on the scope of federal jurisdiction.

The court of appeals' holding rests on two fundamental errors of statutory construction. First, as the Eighth Circuit has concluded, administrative review actions are "civil actions" within the meaning of federal jurisdictional statutes even when they do not call for de novo review of an agency's decision. Indeed, federal district courts routinely hear suits challenging administrative action under the Administrative Procedure Act as part of their federal-question jurisdiction conferred by Section 1331, the coverage of which is also limited to "civil actions."

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[2] Section 1441(c) provides: "Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." 28 U.S.C. § 1441(c).

Second, the removal statute, 28 U.S.C. § 1441, contains no requirement that every claim in a removed action must be a "civil action" for removal to be proper. As the Sixth and Ninth Circuits have concluded, a state-court complaint is removable even if some of the claims in it may not be independently heard in federal court. That rule should control here. This lawsuit contained claims challenging the constitutionality of a decision by the Landmarks Commission that required no deferential or appellate-style review of the Commission's decision. Those claims were within the district court's original jurisdiction, as the court of appeals itself acknowledged. And this constitutional attack on an agency's decision did not become something other than a "civil action" simply because it was joined with state-law claims that were not within the district court's original jurisdiction. That is because ICS's state-law administrative review claims did not need to be a "civil action" themselves—they are instead removable as supplemental state-law claims under 28 U.S.C. § 1367.

These errors are particularly serious because when district courts apply the decision below (in circuits that follow the rule adopted here or in circuits where the question is open and a district court is persuaded by the decision below), appellate review will not be available given the restrictions of 28 U.S.C. § 1447(d), which prohibits review of an order remanding a case for lack of jurisdiction by appeal, mandamus, or otherwise. Unless the Court reviews this issue now, its ability to reach it later will be sharply circumscribed.

1. Relying primarily on *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), and *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995), the panel held that actions seeking judicial review of administrative decisions are not removable "civil actions" when state law does not provide for de novo review. This result is

difficult to square with the ordinary meaning of the phrase "civil action." ICS's case was "civil" in character, and it was surely an "action" by which ICS sought judicial relief against an adverse and assertedly unlawful governmental decision. Indeed, the decision below is in square conflict with *Range Oil Supply Co. v. Chicago, R.I. & P.R. Co.*, 248 F.2d 477 (8th Cir. 1957), in which the court reached precisely the opposite construction of Section 1441. Indeed, the Seventh Circuit expressly repudiated *Range Oil Supply* in its decision in this case, as did the Fourth Circuit in *Fairfax County*. See App., *infra*, at 15a-16a n.10; *Fairfax County*, 64 F.3d at 158.

In *Range Oil Supply*, Range appealed an adverse decision of a state railroad commission to state court, alleging that the record before the commission established that its decision was unlawful and unreasonable. See 248 F.2d at 478. The railroad removed the action to the district court because the parties were of diverse citizenship, and the district court upheld the commission's decision. See *ibid.* On appeal, the Eighth Circuit concluded that the action was removable as a "civil action" because once Range took the matter to state court "it in effect began a civil suit in which it sought to have the court hold that the order under review was unlawful and unreasonable." *Id.* at 479. And although the railroad claimed that this was really an appeal from the commission's decision, the court concluded that "[t]he phrase 'original jurisdiction' as used in Sec. 1441(a) . . . is and can only be a reference to Sec. 1332(a) and Sec. 1331 . . . both of which are declarations that the United States District Courts shall have original jurisdiction in the cases enumerated." *Ibid.* Range's case met the requirements for diversity jurisdiction, was accordingly within the district court's original jurisdiction, and thus "the court properly retained jurisdiction of the case." *Ibid.* This was also the view that Judge Widener took in dissent in *Fairfax County*. See 64 F.3d at 160-63. Accord *Minnesota v. Chicago & N.W. R. Co.*, 309 F. Supp. 56, 57-58 (D. Minn. 1970); *City of Owatonna v. Chicago, R.I. & P.R. Co.*, 298 F. Supp.

919, 921-22 (D. Minn. 1969); *Vann v. Jackson*, 165 F. Supp. 377, 380 (E.D.N.C. 1958); *Larkin v. Roseberry*, 54 F. Supp. 373, 374-75 (E.D. Ky. 1944); *In re Chicago, M., St. P. & P.R. Co.*, 50 F.2d 430, 433-34 (D. Minn. 1931).

For nearly 40 years, until the two 1995 decisions on which the panel relied, *Range Oil Supply* was treated as hornbook law. Indeed, the two leading commentators cite *Range Oil Supply* for the proposition that state-law claims seeking judicial review of administrative decisions are removable "civil actions" despite the appellate nature of the review to be provided. See 1A James W. Moore, MOORE'S FEDERAL PRACTICE ¶ 0.157[4.-3] at 73-74 (2d ed. 1996); 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3721 at 206-07 (1985).[3] Thus, the decision below, like

[3] Although the panel cited some other decisions for its holding that "district courts are without jurisdiction to review on appeal the findings of state agencies" (App., *infra*, at 15a-16a n.10), these cases all are quite distinguishable. *Labiche v. Louisiana Patients' Compensation Fund Oversight Board*, 69 F.3d 21 (5th Cir. 1995) (per curiam), did not involve removal of a case containing federal attacks on an agency's decision; the plaintiff there had attempted to obtain federal review of a state agency's decision without raising any claim that fell within federal jurisdiction. See *id.* at 22. In *FSK Drug Corp. v. Perales*, 960 F.2d 6 (2d Cir. 1992), the plaintiff had never sought review of the agency's decision under state law, and the court held that FSK's federal civil rights action was "not an appropriate vehicle to consider whether a state or local administrative determination was arbitrary or capricious." *Id.* at 11. In *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978), the court merely held that the federal Administrative Procedure Act did not authorize federal judicial review of what was in reality the decision of a state agency. See *id.* at 413-14. In *Frison v. Franklin County Board of Education*, 596 F.2d 1192 (4th Cir. 1979), the court considered and rejected the plaintiff's constitutional attack on the administrative proceedings that led to her demotion, and then held her state-law claims were not properly pendent to her federal claim. See *id.* at 1193-94. *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972), held that a proceeding before the labor board was before a "court"

Fairfax County and *Armistead*, have upset well-established principles of federal jurisdiction and created a square conflict in the circuits.

No decision of this Court helps to resolve this conflict. Although the Seventh Circuit discussed *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961), it acknowledged that the holdings in both cases are inapplicable here, and that this Court "has not had the opportunity to decide a case in which a party had attempted to remove a state court proceeding when the state administrative review scheme provides for deferential review of a state agency's decision." App., *infra*, at 11a.

In *Stude*, the Court held that the railroad could not remove an appeal it had taken from an administrative order condemning certain properties because the railroad was not a state-court "defendant" within the meaning of the removal statute. See 346 U.S. at 578-80. The Court also held that the railroad could not file an original action in the district court contesting the administrative decision since the railroad had complained only about the size of the condemnation award and a district court has no authority to hear an appeal on "the question of damages and try it apart from the substantive right from which the claim of damages arose." *Id.* at 582. If anything, dicta

for removal purposes, and hence the proceeding was properly removed to federal court. See *id.* at 41-45. In *Trapp v. Goetz*, 373 F.2d 380 (10th Cir. 1966), the court held that Trapp could not file an action seeking a pension because the state pension board had not yet decided his case. See *id.* at 382-83. And although both *Crivello v. Board of Adjustment*, 183 F. Supp. 826 (D.N.J. 1960), and *Collins v. Public Service Commission*, 129 F. Supp. 722 (W.D. Mo. 1955), contain dicta consistent with the decision below, both hold that the state suits at issue raised no federal question and hence were not removable for that reason. See 183 F. Supp. at 828; 129 F. Supp. at 725-26. In his dissent in *Fairfax County*, Judge Widener distinguished most of these cases on the same grounds that we offer here. See 64 F.3d at 162 n.4.

in *Stude* supports the holding in *Range Oil Supply;* the Court in *Stude* wrote that once a party aggrieved by an administrative decision takes "a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court." *Id.* at 578-79. This observation appears to be in no way dependent on the scope of review to be exercised by the state court. In *Horton,* the Court held that an action to set aside a worker's compensation award was removable, although in that case state law permitted trial de novo. See 367 U.S. at 354-55. Thus, as the court below acknowledged, neither decision controls here.

The most powerful reason, however, to conclude that an action seeking a form of deferential review of an administrative decision is a civil action within the district court's original jurisdiction is that this is the settled rule in federal administrative law. The Administrative Procedure Act ("APA") grants those aggrieved by agency action a right of judicial review. See 5 U.S.C. §§ 701-06 (1994). Judicial review of agency action under the APA ordinarily must "go first to the district court rather than to a court of appeals." *International Brotherhood of Teamsters v. Pena,* 17 F.3d 1478, 1481 (D.C. Cir. 1994); accord, *e.g., Public Citizen v. FTC,* 829 F.2d 149 (D.C. Cir. 1987) (per curiam); *City of Norwood v. Harris,* 683 F.2d 150 (6th Cir. 1982) (per curiam). See also *In re School Board of Broward County,* 475 F.2d 1117, 1119 (5th Cir. 1973) (APA authorizes "an original action in a court of competent jurisdiction" and not the filing of an original action for "appellate court review"). This is the case even though judicial review under the APA is also "deferential," as the court of appeals used that term here. Indeed, it has been long settled that the APA ordinarily does not permit trial de novo in the district court, see, *e.g., Camp v. Pitts,* 411 U.S. 138, 141-42 (1973) (per curiam), and that it requires courts to grant substantial deference to the decision of the agency, see, *e.g., Thomas*

Jefferson University v. Shalala, 114 S. Ct. 2381, 2386-87 (1994). Nevertheless, this Court has held that the APA is not itself a grant of jurisdiction to the district courts, and that district courts have original jurisdiction under 28 U.S.C. § 1331 over APA actions seeking judicial review of agency decisions. See *Califano v. Sanders,* 430 U.S. 99, 104-08 (1977). See also *McCartin v. Norton,* 674 F.2d 1317, 1320 (9th Cir. 1982) ("[w]hile the Administrative Procedure Act does not confer jurisdiction on the federal courts to review agency action, it is now clear that 28 U.S.C. § 1331(a) does"). Section 1331, of course, confers "original jurisdiction" over "civil actions." Thus APA actions plainly qualify as "civil actions" within "original jurisdiction" even though they do not involve plenary review of an agency's decision. Moreover, the Rules of Civil Procedure make clear that all actions—including APA review actions—are "civil actions." See Fed. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action.' "). The Seventh Circuit's conclusion here that a claim for deferential judicial review of an administrative decision is not a "civil action" properly within the district court's original jurisdiction is thus not only inconsistent with *Califano v. Sanders* and settled principles of federal jurisdictional practice, but, if correct, would mean that a vast quantity of federal administrative litigation is jurisdictionally defective.

Nor can the holding below be reconciled with the availability of original jurisdiction in the district court over APA actions on the basis that principles of federalism require the phrase "civil action" to be construed differently when the decision of a state or local agency is to be reviewed than when the decision of a federal agency is to be reviewed. Federalism has never been understood to erect an absolute bar to a proceeding in federal court to a challenge to the decision of a state or local agency, even on state-law grounds. Rather, as the Court reiterated only last Term, the rule is that a federal court may hear such a case unless "it presents 'difficult questions of state

law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' or if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1726 (1996) (second internal quotations omitted) (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)). That is not, of course, the test adopted by the Seventh Circuit here.

Moreover, because the holding below does not prevent plaintiffs from seeking de novo review of the decisions of state and local agencies in a federal civil rights action in a district court when the plaintiff wishes a federal forum, it is particularly anomalous when viewed through the lens of federalism. Under the decision below, a plaintiff such as ICS wishing a federal forum to litigate the federal questions that arise from an administrative decision could obtain it by filing an action within federal-question jurisdiction under Section 1331. Given that, it is surely a strange brand of federalism that would limit only the ability of state and local agencies to obtain a federal forum when that is where they choose to defend their administrative actions, while providing those who wish to undermine those decisions with greater ability to select a federal forum. And it is even a stranger brand of federalism that permits federal courts to review the decisions of state and local agencies de novo—as in *Horton*—but forbids federal courts from affording deference to the decisions of those state and local agencies. If federal district courts may review the decisions of federal agencies deferentially, as they plainly can, then federalism provides no reason to bar similar review of the decisions of state and local agencies.

2. Even if the court of appeals were correct that a claim seeking something other than de novo review of a

state administrative decision is not a "civil action," that should not defeat removal when that is not the only claim made in a state-court complaint. As the court below recognized, ICS also brought facial and as-applied constitutional challenges to the decision of the Landmarks Commission that required de novo review. App., *infra*, at 20a. These claims, if brought alone, would plainly qualify as a "civil action," as the court of appeals acknowledged. That court recognized that ICS's complaints included federal-question claims that, "if brought alone, would be removable to federal court . . . ." *Ibid.* In concluding that federal removal jurisdiction over such claims is defeated when the plaintiff joins these claims with other state-law claims that do not independently qualify as a "civil action," the court below erred.

Nothing in the language of Section 1441 supports the result below. Section 1441(a) makes any "civil action" removable, and Section 1441(c) adds that removal remains proper even when a removable claim "is joined with one or more otherwise non-removable claims or causes of action . . . ." Jurisdiction over "claims" that are not themselves removable parts of a "civil action" is in turn conferred by the supplemental jurisdiction statute, which provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other *claims* that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (emphasis added). Thus the district court can hear a "claim" under its supplemental jurisdiction even if it is not itself a "civil action."

Here, as the court of appeals acknowledged, ICS's requests for review of the Landmarks Commission's decision under Illinois administrative law are plainly "claims," *See, e.g.*, App., *infra*, at 4a, 20a, 23a (referring to ICS's administrative review claims as "claims"). Thus they fall

within federal supplemental jurisdiction.[4] Section 1367(a) also contains no exception for claims seeking deferential review, nor an exception for cases within removal jurisdiction. To the contrary, when, as here, a suit combines claims that fall within federal courts' federal question jurisdiction with claims that fall within federal courts' supplemental jurisdiction under Section 1367, the entire suit is properly removable under Section 1441(a). See *Zuniga v. Blue Cross & Blue Shield of Michigan*, 52 F.3d 1395, 1399 (6th Cir. 1995); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 785-87 (3d Cir. 1995); *Booty v. Shoney's, Inc.*, 872 F. Supp. 1524, 1528 (E.D. La. 1995); see also 1A James W. Moore, *supra*, ¶ 0.160[6] at 246 ("If a federal question claim is pleaded, under § 1367(a), the district courts would have original supplemental jurisdiction over any state law claims that the plaintiff may have . . . . Therefore, if an action including both state and federal claims is brought originally in a state court, the district courts would also have supplemental removal jurisdiction under § 1441(a)."). Cf. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350-51 (1988) ("pendent" state law claims properly removed under Section 1441(a) prior to enactment of Section 1367). The court of appeals' contrary decision is inconsistent with the role that these other courts have recognized for supplemental jurisdiction in removal cases, as well as with the plain import of Sections 1331 and 1367, which grant district courts jurisdiction over both "civil actions" and related "claims." Indeed Congress amended Section 1441(c) in 1990 to ensure that district courts could exercise removal jurisdiction over all claims within both their federal-question and supplemental jurisdiction. See *Borough of West Mifflin*, 45 F.3d at 785.

[4] ICS has never contended that its state-law claims are not sufficiently connected to the federal claims to fall within supplemental jurisdiction. Nor could it. ICS's state law and federal claims attack the Landmarks Commission's refusal to approve a demolition permit on essentially the same grounds, as the district court's opinion makes clear. See App., *infra*, at 45a-89a.

Because Congress specifically addressed, in Section 1367, the question whether federal courts should hear "claims" not otherwise within federal jurisdiction when joined with claims within federal-question jurisdiction, and did not exempt claims subject to deferential review, the court of appeals should not have refused the exercise of federal jurisdiction because of its belief that district courts should hear only claims for de novo review. " 'The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.' " *New Orleans Public Service, Inc.*, 491 U.S. at 358 (quoting *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893)). This is because of "the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction. . . ." *Id.* at 359.[5]

The applicable statutory framework here also distinguishes this case from *Francis J. v. Wright*, upon which the court of appeals heavily relied. *Francis J.* involved a suit that was removed to federal court but that included claims that were barred by the Eleventh Amendment. The Seventh Circuit held that removal of such cases was improper, reasoning that

[5] This is not to say that federal courts must necessarily exercise their jurisdiction over supplemental claims such as ICS's. Section 1367(c) identifies a variety of circumstances in which a federal court can decline to exercise jurisdiction over supplemental claims, including the presence of "novel or complex issue[s] of State law" or where state law "substantially predominates over the claim or claims over which the district court has original jurisdiction." But ICS never sought a Section 1367(c) remand in the district court, and even if the court of appeals had been inclined to forgive this waiver, that would not support its jurisdictional holding. Section 1367(c) simply authorizes a discretionary remand of state-law claims; it does not negate the existence of jurisdiction over the federal claims.

> if even one claim in an action is jurisdictionally barred from federal court by a state's sovereign immunity, or does not otherwise fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court.

19 F.3d at 341. This reasoning does not reach this case. Here, as we explain above, there was jurisdiction over all of ICS's claims—either original jurisdiction under Section 1331 or supplemental jurisdiction under Section 1367.

Francis J. is in any event a slender reed on which to premise a decision to foreclose federal jurisdiction here—indeed, the soundness of *Francis J.* independently merits plenary review. While one circuit has reached the same result, *see McKay v. Boyd Construction Co.*, 769 F.2d 1084, 1086-87 (5th Cir. 1985); accord *Flores v. Long*, 926 F. Supp. 166, 168-70 (D.N.M. 1995), two other circuits have rejected this approach, reasoning that the Eleventh Amendment bars federal jurisdiction over only particular claims and that a jurisdictional bar to hearing some claims should lead only to remand of those claims but not defeat the court's ability to hear removed claims within its federal jurisdiction. See *Kruse v. Hawai'i*, 68 F.3d 331, 334-35 (9th Cir. 1995); *Henry v. Metropolitan Sewer District*, 922 F.2d 332, 336-39 (6th Cir. 1990). Accord *Brewer v. Purvis*, 816 F. Supp. 1560, 1570-71 (M.D. Ga. 1993), aff'd, 44 F.3d 1008 (11th Cir.), cert. denied, 115 S. Ct. 1965 (1995), *Texas Hospital Association v. National Heritage Insurance Co.*, 802 F. Supp. 1507, 1512-16 (W.D. Tex. 1992).

The decision below not only is in conflict with the law in other circuits, but it creates a serious problem in removal jurisprudence. Under the Seventh Circuit's ruling, a state court plaintiff could defeat removal by casting its constitutional challenge as a state-law administrative review count whenever the plaintiff is content to rely on the administrative record. Yet it is a settled rule of removal

jurisprudence that a state-court plaintiff should not be able to defeat the right of removal through "artful pleading." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981). The holding below, which permits just that, should accordingly be reviewed by this Court.

3. Even without the conflicts with the decisions of other circuits and errors in the holdings below, the Seventh Circuit's decision about the scope of federal jurisdiction itself merits plenary review—for one thing, it means that a state-court plaintiff can defeat the right to removal of federal constitutional claims by including at least one claim that seeks deferential review; for another, it means that even a federal plaintiff cannot bring all claims arising from a single administrative decision in a single action in a federal forum, since the presence of a state claim seeking deferential review means that the entire case is not a "civil action" and thus not within Section 1331's federal-question jurisdiction.

Administrative adjudication is becoming an ever-more prevalent method of enforcing state and local laws. With increasing frequency, the backlog in state and local court systems is being addressed by removing cases from the state judiciary and placing them in state or local administrative agencies. The holding below—eliminating federal-question jurisdiction whenever the complaint presents at least one claim seeking something other than de novo review of an administrative decision—will radically circumscribe federal jurisdiction over cases seeking judicial review of the decisions of state and local agencies. This, in turn, creates a serious gap in the availability of federal jurisdiction in which important federal questions are raised or in which a nonresident of the forum state who is aggrieved by an administrative decision seeks a federal forum.

Moreover, the need for this Court's intervention is especially urgent because of the limits on review of an order

of a district court remanding a case to state court. There are now three circuits in which district courts will be bound to remand to state court any case seeking other than de novo review of an agency's decision, and orders of remand for lack of jurisdiction are not ordinarily reviewable on appeal or otherwise. See 28 U.S.C. § 1447 (d). "If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). See also *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494, 497 (1995). Thus, "Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court." *Thermtron Products*, 423 U.S. at 351. Accordingly, for any case in these three circuits, review by this Court will no longer be available. Nor will review be available from any decision of a district court in any other circuit to remand a case under the rationale employed by the Seventh Circuit here. Conversely, in circuits that follow *Range Oil Supply* or *Kruse* and *Henry*, a substantial quantity of federal litigation is now underway that will prove jurisdictionally defective should this Court ultimately agree with the holding below. The need for review of the question presented here is therefore unusually clear, as it often will be whenever the scope of federal jurisdiction over a large class of cases has been cast into doubt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 95-1293, 95-1315

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, Illinois, a municipal corporation, CHICAGO PLAN COMMISSION, and its commissioners, REUBEN L. HEDLUND, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
[Nos. 91 C 1587, 91 C 5564 &] 91 C 7849—
John F. Grady, *Judge*

ARGUED NOVEMBER 6, 1995—DECIDED AUGUST 1, 1996

Before BAUER and RIPPLE, *Circuit Judges*, and SKINNER, *District Judge.**

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* The Honorable Walter Jay Skinner of the United States District Court for the District of Massachusetts is sitting by designation.

RIPPLE, *Circuit Judge.* The International College of Surgeons and the United States Section of the International College of Surgeons (collectively the "College") applied to the Commission on Chicago Historical and Architectural Landmarks (the "Landmarks Commission") for the demolition permits required to redevelop certain landmarked property on Lake Shore Drive in Chicago. The Landmarks Commission denied this application and the College's subsequent request for an economic hardship exemption. The College, alleging various federal and state constitutional grounds, challenged the Commission's decisions in separate complaints for administrative review filed in the Circuit Court of Cook County. The City of Chicago removed the complaints to federal court. The district court later granted the City's motion to dismiss certain of the College's challenges and entered summary judgment against the College on the remaining claims. For the reasons set forth in the following opinion, we reverse the judgment of the district court and remand with instructions that the case be remanded to the Circuit Court of Cook County.[1]

I

BACKGROUND

The College owns two parcels of land on Lake Shore Drive in Chicago. The first parcel, located at 1516 Lake Shore Drive, is improved with a four-story mansion known as the Edward T. Blair House. The second parcel, at 1524 Lake Shore Drive, is improved with a three-story mansion known as the Eleanor Robinson Countiss House. The College uses the buildings, which are connected by a bridge that enables their use as one structure, to house administrative offices and a museum.

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[1] For the disposition of the federal declaratory action that had been consolidated with the complaints for administrative review, *see infra* note 15.

In July 1988, the Landmarks Commission made a preliminary determination that seven buildings on Lake Shore Drive, including the properties at issue here, met the criteria for landmark designation set out in the Chicago Landmarks Ordinance.[2] The Landmarks Commission voted to recommend to the City Council that the seven buildings receive landmark designation and, on June 28, 1989, the Chicago City Council passed the "Seven Houses on Lake Shore Drive District Ordinance" (the "Designation Ordinance") designating the landmark district.

In February 1989, before the enactment of the Designation Ordinance, the College executed a contract for the sale and redevelopment of the property. The $17 million contract, which provided for the demolition of all but the facades of the Blair and Countiss residences and the construction of a forty-one-story condominium building behind the facades was contingent on the College's ability to obtain all the permits and approvals necessary for redevelopment of the property. Robin Construction Corporation, a developer of high-rise residential developments and one of the plaintiffs here, acquired the contract purchaser's interest later in 1989.

When the College applied for permission to demolish the buildings at 1516 and 1524 Lake Shore Drive, its applications were forwarded to the Landmarks Commission. The Commission rendered its final decision denying the College's permit requests on January 9, 1991. The College then filed its first complaint in the Circuit Court of Cook County (No. 91 CH 1361); it sought judicial review of the administrative decision to deny the permits. The defendants removed this complaint to the United States District Court for the Northern District of Illinois, where it was docketed as number 91 C 1587.

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[2] The Chicago Landmarks Ordinance creates the Commission and establishes the procedures for designating properties as Chicago Landmarks. *See* Municipal Code of Chicago ("MCC") §§ 2-120-580 to 2-120-920.

Pursuant to section 21-86 of the Landmarks Ordinance, the College also filed an application seeking an economic hardship exception to the Landmarks Commission's denial of the demolition permits. The Commission concluded that its denial of the demolition permits had not resulted in "the loss of all reasonable and beneficial use of or return from the property"—the standard that appears in the Landmark Ordinance—and denied the College's application. The College then filed its second complaint in the Circuit Court of Cook County (No. 91 CH 7289) seeking judicial review of the administrative decision to deny the economic hardship exception. Again, the defendants removed the action to federal district court, where it was docketed separately as number 91 C 5564.

Because the property also is governed by the Lake Michigan and Chicago Lakefront Protection Ordinance, the College was required to obtain approval for its proposed development under that ordinance as well. The Chicago City Council rejected the College's application for permits under the Lakefront Protection Ordinance, and the College filed a "Complaint for Declaratory Judgment and Other Relief" in the district court, where it was docketed as number 91 C 7849.

The district court consolidated the three cases and stayed case 91 C 7849—the declaratory judgment action—pending disposition of the other cases. In an order dated January 10, 1992, the court granted in part and denied in part the City's motion to dismiss cases 91 C 1587 and 91 C 5564—the complaints for administrative review. The College then filed an amended "Consolidated Complaint for Administrative Review" in the two cases again alleging federal and state law claims. On December 30, 1994, the district court entered summary judgment in favor of the City on all of the plaintiff's claims; it thus affirmed the Landmarks Commission's decision denying the College's application for demolition permits and denying its application for an economic hardship exception.

Having reached this conclusion, the court dismissed case 91 C 7849 with prejudice as moot and with leave to reinstate if the court's judgments in cases 91 C 1587 and 91 C 5564 were vacated, reversed or remanded on appeal. The College filed a notice of appeal in all three cases.

II

DISCUSSION

Before proceeding to the issues raised by the parties, we must determine whether the district court had subject matter jurisdiction over the claims raised in the College's complaint. The parties did not address the issue in their initial presentations to this court;[3] subject matter jurisdiction, however, cannot be waived. Courts have a duty to resolve apparent jurisdictional problems sua sponte.[4]

A.

The College commenced the judicial proceedings in this case in the Circuit Court of Cook County. The College

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[3] At oral argument, we invited counsel to submit letters commenting on the jurisdictional issues raised by the Fourth Circuit in *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co., Inc.*, 64 F.3d 155 (4th Cir. 1995). The parties' submissions have been made part of the record on appeal.

[4] *See* Fed. R. Civ. P. 12(h)(3); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 896-97 (1991) (Scalia, J., concurring) (discussing the " 'nonwaivability' of the lack of subject-matter jurisdiction"); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) ("Here it was the duty of the court to see that they had jurisdiction, for the consent of the parties could not give it."); *Commercial Nat'l Bank of Chicago v. Demos*, 18 F.3d 485, 487 (7th Cir. 1994) ("That the parties have not contested, nor the district ocurt considered jurisdiction does not impede our inquiry. . . . [W]e must consider the issue sua sponte when it appears from the record that jurisdiction is lacking."); *United Steelworkers of America v. Libby, McNeil & Libby, Inc.*, 895 F.2d 421, 423 (7th Cir. 1990) ("Every federal appellate court has a special obligation to satisfy itself of the jurisdiction of the lower federal courts in a case under review.") (citations omitted).

sought, by way of its "Complaint for Administrative Review," judicial review of the Landmarks Commission's decision to deny its application for demolition permits. The complaint was filed pursuant to the Illinois Administrative Review Act ("IARA"), *see* 735 ILCS 5/3-103 *et seq.*, because the Landmarks Ordinance makes the final decision of the Commission approving or disapproving an application for a permit a "final administrative decision" appealable under the Act. *See* MCC § 2-120-800.[5] The College filed a second "Complaint for Administrative Review" after the Commission denied its application for an economic hardship exception. *See* MCC § 2-120-860.[6] The defendants sought the removal of each of these complaints to the United States District Court for the Northern District of Illinois.

Removal of "civil actions" from state court to federal court is authorized by 28 U.S.C. § 1441. The operative provision, section 1441(a), provides in relevant part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court

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[5] Section 2-120-800 provides:

> Final Commission Decision. The written decision of the Commission approving or disapproving an application for a permit . . . shall be on the date it issues a final administrative decision appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act, Ill. Rev. Stat. Chapter 110, Sec. 3-101 *et seq.* (1985).

MCC § 2-120-800.

[6] Section 2-120-860 provides:

> Appeal from Commission Decision. The determination by the Commission . . . approving or disapproving an application for an economic hardship exception shall, on the date it issues, be a final administrative decision appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act, Ill. Rev. Stat. Chapter 110, Sec. 3-101, *et seq.* (1985).

MCC § 2-120-860.

> of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). Under section 1441(a), therefore, the removal jurisdiction of the district court is tied to the original jurisdiction of the federal courts; removal is proper only if the action originally could have been brought in the district court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Seinfeld v. Austen*, 39 F.3d 761, 763 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1998 (1995); *Frances J. v. Wright*, 19 F.3d 337, 340 (7th Cir.), *cert. denied*, 115 S. Ct. 204 (1994). Noting the presence of federal claims, the district court concluded that it had original jurisdiction over the College's complaints under the federal question statute, 28 U.S.C. § 1331. That section confers "original jurisdiction" on the district courts with respect to "civil actions . . . arising under the Constitution, laws, or treaties of the United States." *Id.*

Whether a state action was properly removed to federal court is a question of federal jurisdiction and, accordingly, subject to de novo review. *Seinfeld*, 39 F.3d at 763 (citing *Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401 (9th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993)). The specific question we must confront is whether the College's "Complaint for Administrative Review," filed under the Illinois Administrative Review Act, is a "civil action . . . of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a).

B.

We begin our analysis with the Supreme Court's decision in *Chicago, Rock Island & Pacific Railroad v. Stude*, 346 U.S. 574 (1954). In *Stude*, the Iowa State Commerce

Commission had authorized a railroad to acquire the land necessary to improve its line of railway in a certain Iowa county. A state agency assessed condemnation damages against the railroad and, in order to obtain relief from this assessment, the railroad pursued two different avenues of relief. First, the railroad filed a complaint in federal district court. Invoking that court's diversity jurisdiction, the complaint asked the district court to review the agency's damage assessment. The district court granted the landowner's motion to dismiss the complaint, and the Supreme Court of the United States eventually affirmed that dismissal. The Court held that the district court was without jurisdiction to conduct a review of the state agency's ruling because "[t]he United States District Court for the Southern District of Iowa does not sit to review on appeal action taken administratively or judicially in a state proceeding." *Id.* at 581. Noting that "a State legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction," the Court held that neither Congress nor the Federal Rules of Civil Procedure provided for such an appeal to the federal courts. *Id.* (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 317 (1943)).[7]

[7] The Supreme Court had also confronted the issue of federal court review of state administrative decisions in *Burford*. There, the Sun Oil Company had invoked the diversity jurisdiction of the district court to attack the validity of an order of the Texas Railroad Commission granting Burford a permit to drill four oil wells on a certain plot of land. Sun Oil further contended that the Railroad Commission's order denied it due process of law. Justice Black, in remarks prefatory to the Court's discussion of abstention by the federal courts, wrote:

> There is some argument that the action is an "appeal" from the State Commission to the federal court, since an appeal to a state court can be taken under relevant Texas statutes; but of course the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order.

Burford, 319 U.S. at 317 (footnotes omitted).

As a second avenue of relief, the railroad appealed the state agency's assessment of condemnation damages to the state court using the procedure established by Iowa for administrative appeals. Under this procedure, the party aggrieved in the state agency may appeal to state court, and the case is "tried [by the state court] as in an action by ordinary proceedings." *Id.* at 576 (quoting Iowa Code § 472.21 (1950)). The railroad filed a notice of appeal seeking this de novo trial in state court, and the case was docketed, in accordance with the Iowa Code, with the landowner as plaintiff and the railroad as defendant. The railroad then attempted to remove the litigation to federal court. The district court denied the landowner's motion to remand the case to state court; the Court of Appeals reversed, however, and ordered this second case remanded to the state court. The Supreme Court affirmed this decision of the Court of Appeals on the ground that, for purposes of 28 U.S.C. § 1441(a), the railroad is the plaintiff and therefore cannot remove. However, addressing the nature of the state proceeding, the Supreme Court wrote:

> The proceeding before the sheriff is administrative until the appeal has been taken to the district court of the county. Then the proceeding becomes a civil action pending before those exercising judicial functions for the purpose of reviewing the question of damages. When the proceeding has reached the stage of a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court.

Id. at 578-79. Notably, the Court did not suggest that all agency action becomes a "civil action" upon its arrival for review in state court. Rather, the Court found the

nature of the state judicial proceeding at issue in *Stude* to be significant. The case removed from state court to the district court was a de novo proceeding "tried [by the state court] as an action by ordinary proceedings." *Id.* at 576 (quoting Iowa Code § 472.21 (1950)).

This focus on the character of the state judicial action to determine whether or not it is a "civil action . . . of which the district court has original jurisdiction" finds further support in the Supreme Court's decision in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). In *Horton*, the Liberty Mutual Insurance Company contested a workman's compensation award granted to an employee by the Texas Industrial Accident Board. Texas law provided for such challenges to be made in a trial de novo, and Liberty Mutual, invoking the diversity jurisdiction of the federal district courts, filed its challenge in federal court. The Supreme Court upheld the district court's exercise of jurisdiction. Noting that the Texas Supreme Court had characterized these actions as "suits" and not "appeals," the Court wrote:

> It is true that as conditions precedent to filing a suit a claim must have been filed with the Board and the Board must have made a final ruling and decision. But the trial in court is not an appellate proceeding. It is a trial de novo wholly without reference to what may have been decided by the Board.

Horton, 367 U.S. at 355.[8] Accordingly, the Supreme Court concluded, the district court had jurisdiction over the insurance company's action. *Id.*

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[8] In a footnote, the Supreme Court noted that, under the decisions of the Texas Supreme Court, the administrative award becomes vacated and unenforceable once the state court acquired jurisdiction of the cause and the parties. "This makes it all the more clear that the matter in controversey between the parties to the suit is not merely whether the award will be set aside since the suit automatically sets it aside for determination of liability de novo." *Horton*, 367 U.S. at 355 n.15.

In *Stude* and *Horton*, therefore, the Supreme Court held that the district court properly exercised removal jurisdiction over state court actions that review de novo the earlier decision of a state administrative agency. In each case, the Court emphasized that the state court action subject to removal was a de novo suit in the state court; neither action required review of the agencies' findings or determinations. Because state judicial proceedings of this sort are conducted "wholly without reference to what may have been decided by the [state agency]," *id.* at 354-55, these actions cannot be characterized as "appeals" of an agency's decision; rather, such actions are "suits" like any other civil action over which the state court exercises original jurisdiction. The teaching of *Stude* and *Horton*, therefore, is that a state judicial proceeding to conduct de novo review of a state administrative decision is a "civil action[ ] . . . of which the district court has original jurisdiction" within the meaning of 28 U.S.C. § 1441(a).

The Supreme Court has not had the opportunity to decide a case in which a party had attempted to remove a state court proceeding when the state administrative review scheme provides for deferential review of a state agency's decision. However, our colleagues in other circuits have held that the district courts do not have jurisdiction to entertain such actions. The Fourth Circuit, in *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), examined the question of removability in the context of a Virginia statute allowing for judicial review of state administrative decisions involving public contract disputes. *See* Va. Code Ann. § 11-71. The case arose out of a dispute between Fairfax County and the W.M. Schlosser Company, a contractor that had contracted to build a housing project for the county. Alleging that the county had not paid it in full, the contractor brought a state administrative claim against the county. The Fairfax County Executive, to whom the claim had been brought under a Virginia admin-

istrative review scheme, determined that the county had breached the parties' contract and ordered it to pay the deficiency. The county appealed to a Virginia circuit court under Virginia Code § 11-71, and the contractor, invoking the diversity jurisdiction of the district courts, removed the county's appeal to the district court for the Eastern District of Virginia. The Fourth Circuit held that the district court did not have jurisdiction to review the County Executive's decision. After reviewing the Supreme Court's holdings in *Stude* and *Horton*, the Fourth Circuit focused its analysis on the scope of the "judicial review" afforded by the Virginia administrative review statute in question. In this review,

> the findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary and capricious, or so grossly erroneous as to imply bad faith. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner.

Id. at 158 (quoting Va. Code Ann. § 11-71). Noting the deferential standard of review employed by the district court in reviewing the administrative decision, the Fourth Circuit summarized its holding:

> Because the district court is a court of original jurisdiction, not an appellate tribunal, and, thus, is without jurisdiction to review on appeal action taken administratively or judicially in a state proceeding, it was without jurisdiction to conduct such a review of the County Executive's finding.

Id. Accordingly, the Fourth Circuit, following *Stude*'s holding that only "civil actions" may be removed to the district court, ordered the case remanded to the Virginia circuit court.

Our colleagues in the First Circuit reached a similar conclusion in *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995), which involved a defendant's

attempt to remove an action filed in state court to enforce an award issued by Maine's Workers' Compensation Commission. Removal of the case is "doubly barred," the First Circuit explained, because of the explicit statutory bar of 28 U.S.C. § 1445(c) and because the "supplementary superior court proceeding" to enforce the Commission's award does not qualify independently as a "civil action" removable under 28 U.S.C. § 1441(a). *Id.* at 46 (citing, *inter alia*, *Federal Savings & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1018 (7th Cir. 1969)). Judge Selya, writing for the court, elaborated on the latter proposition:

> [T]he limited supplementary and appellate authority exercised by Maine courts over Commission proceedings finds no analogue in federal diversity jurisdiction. As courts of original jurisdiction, federal district courts sitting in diversity jurisdiction do not have appellate power, nor the right to exercise supplementary equitable control over original proceedings in the state's administrative tribunals.

Id. at 47.[9] Accordingly, the First Circuit ordered the cause remanded to state court.

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[9] The reasoning employed by the First Circuit in *Armistead* is similar to that found in federal workmen's compensation cases decided before the enactment of 28 U.S.C. § 1445(c). These cases took the view that, once the state administrative process had come to an end, the question of whether a suit challenging an award may be brought in the district court depends upon the nature of the review provided by the state statute:

> For example, where a right of trial de novo is provided in a state court of general jurisdiction, the de novo trial constitutes an original civil action; where only a right of an appellate, quasi-administrative review is provided in a state court, this is not a civil action within the cognizance of the original jurisdiction of the federal court.

1A James Wm. Moore et al., Moore's Federal Practice ¶ 0.167[6] & n.15 (Supp. 1994) (collecting cases); *e.g.*, *Decker v. Spicer Mfg. Div. of Dana Corp.*, 101 F. Supp. 207 (N.D. Ohio 1951); *see also* 1A James Wm. Moore et al., 0.157[4.-3] & nn.6-7 ("A statutory

We agree with our colleagues in the First and Fourth circuits that, in determining whether a state action seeking judicial review of a state administrative agency's decision is removable, the focus must be upon the character of the state proceeding and upon the nature of the review conducted by the state court. If the state administrative review process provides for a trial de novo, removal of the action to federal court does not require the district court to perform an appellate function that is inconsistent with the character of a court of original jurisdiction. Under those circumstances, the state proceeding can be termed a "civil action." If, however, the state administrative review process requires the state court to proceed on the basis of a more deferential review of the state agency's findings and determinations, removal of the action to federal court would require the district court to perform an appellate role with respect to the decision of the state administrative agency. The district court would not be performing a function that could be described as a "civil action" within its original jurisdiction and, accordingly, the requirement of 28 U.S.C. § 1441(a) would not be fulfilled. We turn, therefore, to an examination of how the Illinois courts review administrative actions of the type involved in this case. Our focus must be on the scope of judicial review that would have been exercised by the

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proceeding in state court to review an administrative determination is a civil action, unless the review proceeding is such an integral part of the administrative process as to constitute a continuation of the administrative proceeding."); *cf. Federal Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1018 (7th Cir. 1969) (noting that "[a] supplementary proceeding, which is substantially a continuation of a prior suit, is not removable"); *Collins v. Public Serv. Comm'n of Missouri*, 129 F. Supp. 722 (W.D. Mo. 1955) (ruling that statutory state court review of Public Service Commission's finding that proposed condemnation would be in the public interest is a continuation of the administrative proceedings and not a civil action brought in a state court of which the district courts have original jurisdiction). Our holding today implicates the same concerns articulated in this line of cases.

Cook County Circuit Court in this case had it not been removed.[10]

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[10] Although the precise procedural contexts have varied, we note that other courts have concluded that district courts are without jurisdiction to review on appeal the findings of state agencies. *See Labiche v. Louisiana Patients' Compensation Fund Oversight Bd.*, 69 F.3d 21, 22 (5th Cir. 1995) (per curiam) ("We have reviewed [the statutes fixing the jurisdiction of the district courts] and none would authorize appellate review by a United States District Court of any actions taken by a state agency."); *Armistead*, 49 F.3d at 47-48 & n.4; *W.M. Schlosser*, 64 F.3d at 157-58 (collecting cases); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 11 (2d Cir. 1992) ("This Court lacks jurisdiction to hear the Company's claim that the [state agency's] substantive decision was arbitrary and capricious."); *Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978) (holding that the district court was without jurisdiction to review the denial of a permit by a state agency); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 42 (1st Cir. 1972) ("To the etxent that the federal district court would treat a case removed from the [state court] as a review of an administrative decision by giving deference to the [agency's] determination, . . . this would place a federal court in an improper posture vis-a-vis a non-federal agency."); *Trapp v. Goetz*, 373 F.2d 380, 383 (10th Cir. 1966) ("An appeal from a state administrative board is not a 'civil action' as required by 28 U.S.C.A. § 1331 or § 1332."); *cf. Frison v. Kranklin County Bd. of Educ.*, 596 F.2d 1192, 1194 (4th Cir. 1979) (noting that the district court should have declined pendent jurisdiction over a demoted school teacher's state law claim because "it is essentially a petition for judicial review of state administrative action rather than a distinct claim for relief"); *Crivello v. Board of Adjustment of the Borough of Middlesex*, 183 F. Supp. 826 (D. N.J. 1960) (noting, in the course of remanding a proceeding brought in lieu of a prerogative writ of certiorari to review decision of zoning board, that "the nature of the proceeding is necessarily determinative of its removability under Sections 1441 and 1442"); *Collins v. Public Serv. Comm'n. of the State of Missouri*, 129 F. Supp. 722 (W.D. Mo. 1955) (noting "doubts as to whether [a petition to review an order of state agency] constitutes a 'civil action'" and holding that such a proceeding is not "one 'of which the district courts of the United States have original jurisdiction' within the meaning of the removal act"). The only case expressing the opposite view is *Range Oil Supply Co. v. Chicago, Rock Island & Pacific Railroad*, 248 F.2d 477 (8th Cir. 1957). There, the Eighth Circuit took the view that, once the aggrieved party

C.

1.

We begin our examination of Illinois practice with the Illinois Administrative Review Act. As a general proposition, the IARA provides the exclusive method by which an aggrieved party may obtain judicial review of decisions made by certain administrative agencies in Illinois. *See* 735 ILCS § 5/3-102. The IARA provides for judicial review of "final decision[s]" of those administrative agencies whose enabling legislation adopts, by express reference, the provision of the Act. *Id.*

The judicial function performed by an Illinois court when it is reviewing agency action under the Illinois Administrative Review Act, is substantially different from the function that it performs when acting as a court of original jurisdiction. In reviewing an administrative decision, the court exercises a statutory, and not a general appellate, jurisdiction. Therefore, its powers are limited to the functions enumerated in 735 ILCS § 5/3-111.[11] *See*

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has taken an appeal to the state court, the proceeding becomes a civil action which is removable to the district court so long as the "jurisdictional requisites" of diversity of citizenship and amount in controversy are met. *Id.* at 479. We are unpersuaded by this reasoning. As the Fourth Circuit noted in *W.M. Schlosser*, the Eighth Circuit "did not consider that the diversity statute vests only 'original' and not 'appellate' jurisdiction in the district courts." *See* 64 F.3d at 158. The *Range Oil* court equates "original jurisdiction" with the prerequisites of diversity jurisdiction, rendering the former requirement meaningless.

[11] Under 735 ILCS § 5/3-111, the circuit court has the power to stay an administrative decision; to order the agency to amend, complete, or file the record of the administrative proceeding; to substitute, dismiss, or realign parties; to affirm or reverse the agency's decision in whole or in part; to remand the decision with proper instructions; and to enter money judgments where appropriate. The Illinois courts have construed strictly section 3-111 and have limited the reviewing court to exercising the powers enumerated therein. *E.g., Chestnut v. Lodge*, 210 N.E.2d 336, 341 (Ill. App. Ct. 1965), *rev'd on other grounds*, 216 N.E.2d 799 (Ill. 1966).

Adamek v. Civil Serv. Comm'n, 149 N.E.2d 466, 469 (Ill. App. Ct. 1958). 735 ILCS § 5/3-110 limits the scope of judicial review:

> **Scope of Review** . . . The hearing and determination shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support or opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.

735 ILCS § 5/3-110. Nevertheless, the Illinois courts and, indeed, this court, have noted that an Illinois court reviewing agency action under the IARA has the authority to rule on constitutional issues. Indeed, the validity of the ordinance upon which the proceeding is based may be challenged in the judicial review proceedings. *Howard v. Lawton*, 175 N.E.2d 556 (Ill. 1961); *Murray v. Board of Review of Peoria Co.*, 604 N.E.2d 1040, 1043 (Ill. App. Ct. 1992); *see also Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1976). "To hold otherwise would result in piecemeal litigation by first requiring review of an administrative body's decision and then entertaining another action to test constitutionality brought on by such decision." *Howard*, 175 N.E.2d at 557.

When the constitutional issue involves the fairness of the administrative proceedings or the application of constitutional principles to the facts of the case before the administrative tribunal, the court is bound by the record made at the administrative proceeding. *Reich*, 527 F.2d at 671. Therefore, allegations that the governing legislation has been applied in a discriminatory or arbitary manner require the exhaustion of administrative remedies. *City of Chicago v. Piotrowski*, 576 N.E.2d 64, 67 (Ill. App. Ct. 1991). In such a circumstance, when the record

is insufficient to permit a ruling on the constitutional claim, the court may remand the matter to the agency for further evidence. *Reich*, 576 F.2d at 671.

By contrast, facial attacks on the constitutionality of a statute or ordinance are not dependent on the factual record developed at the administrative hearing. Therefore, if not brought in the administrative proceeding, they may be brought without the exhaustion of administrative remedies.[12]

It is clear, then, that, as a general rule, the scope of judicial review accorded by IARA is akin to the deferen-

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[12] The Illinois Supreme Court made this distinction succinctly in *Bank of Lyons v. County of Cook*, 150 N.E.2d 97, 98 (Ill. 1958):

> Where the alleged constitutional infirmity is to be found in its terms, prior application for administrative relief is unnecessary. On the other hand, where it is alleged that a statute valid upon its face is applied in a discriminatory or arbitrary manner, the rule generally prevails that recourse must be had in the first instance to the appropriate administrative board. . . . In such cases the validity or invalidity depends almost wholly upon a determination of factual matters in which the specialized agency is thought to be more proficient.

The earlier pronouncement in *Bright v. City of Evanston*, 139 N.E.2d 270, 274 (Ill. 1957), was even more graphic in its statement of the general rule:

> A review of applicable authorities would seem to indicate that where it is claimed the effect of an ordinance as a whole is to unconstitutionally impair the value of the property and destroy its marketability, direct judicial relief may be afforded without prior resort to remedies under the ordinance. Under this rule one who seeks relief from an ordinance on the ground that it is void in its entirety is not obliged to pursue the machinery of the ordinance itself for his remedy. On the other hand, where the claim is merely that the enforcement or application of a particular classification to the plaintiff's property is unlawful and void, and no attack is made against the ordinance as a whole, judicial relief is appropriate only after available administrative remedies have been exhausted.

See also Head-On Collision Line, Inc. v. Kirk, 343 N.E.2d 534, 538 (Ill. App. Ct. 1976).

tial standard of review at issue found in *W.M. Schlosser* and in *Armistead*. It does not entail the trial de novo found in *Stude* and *Horton*. Although the state trial court's review extends to "all questions of law and fact presented by the entire record," it may not hear new evidence and must accept the agency's findings and conclusions on questions of fact as "prima facie true and correct." 735 ILCS § 5/3-110. Judicial scrutiny with this level of deference to the decision of the administrative agency certainly cannot be characterized as within the original jurisdiction of the court. An action for judicial review under IARA is not a "trial de novo wholly without reference to what may have been decided by the [administrative agency]." *Horton*, 367 U.S. at 355. It is an appellate proceeding and, as such, it is not a "civil action . . . of which the district courts . . . have original jurisdiction" within the meaning of 28 U.S.C. § 1441(a).

Illinois' administrative review procedure scheme also permits an attack on the facial validity of the statute; such attack can be brought independently of the administrative action or it may also be brought—as it was here—in the action for judicial review under the IARA. If only facial attacks are brought in the administrative review procedure, we may assume that, under the approach taken by the Supreme Court in *Stude* and *Horton*, the action in the state court would be considered an original action that raised a federal question and was therefore subject to removal to the district court. *See* 28 U.S.C. § 1441(a).

2.

In addition to review under the Illinois administrative review scheme, Illinois courts also recognize the bringing of a separate action under 42 U.S.C. § 1983 to challenge the federal constitutionality of the administrative action. *See Stratton v. Wenona Community Unit Dist. No. 1*, 551 N.E.2d 640, 646 (Ill. 1990). Although there is precedent to the contrary in another part of the country,

see FSK Drug Corp. v. Perales, 960 F.2d 6, 11 (2d Cir. 1992), both the Illinois Supreme Court and this court have held that such a suit will be entertained both with respect to facial and "as applied" challenges to the administrative action. *Id.*; *see also Davis v. City of Chicago*, 53 F.3d 801, 802-03 (7th Cir. 1995); *Rogers v. Desidero*, 58 F.3d 299, 301 (7th Cir. 1995), *cert. dismissed*, 116 S. Ct. 1562 (1996); *Button v. Harden*, 814 F.2d 382, 384-85 (7th Cir. 1987). Such a claim is independent of the administrative review proceeding and is therefore plenary in its scope; the court is not confined by the administrative record. Under these circumstances, if the § 1983 action were brought alone or with other claims not confined to the administrative record, the rule of *Stude* and *Horton* would allow removal to the federal court.

D.

Here, the two complaints for administrative review filed in the Circuit Court of Cook County and removed to the district court contain facial attacks on the validity of the statute, allegations of unfairness of a federal constitutional dimension,[18] and claims based on state grounds that clearly require the exhaustion of the administrative process and that must be adjudicated on the basis of the administrative record. We therefore must decide whether, when the state action involves both claims that, if brought alone, would be removable to federal court with issues that clearly are grounded in the administrative record, removal of the entire state action to the district court is possible.

This court already has confronted a situation in which certain aspects of a state proceeding, if segregated from the remainder of that proceeding, could be characterized as a civil action within the original jurisdiction of the district court while other aspects of the same state proceeding could not be so characterized. That case provides significant guidance. In *Francis J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 115 S. Ct. 204 (1994), the court was confronted with an attempt to remove a complaint that contained claims barred by the Eleventh Amendment and the doctrine of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), along with other claims that were clearly subject to removal pursuant to 28 U.S.C. § 1441(a). The court held that, under those circumstances, the case could not be removed to the district court. The starting point of the court's analysis was the text of section 1441(a) which, the court noted, "only authorizes the removal of *actions* that are within the original jurisdiction of the federal courts." *Francis J.*, 19 F.3d at 340. "By the plain meaning of § 1441(a), an action that contains claims barred by sovereign immunity, cannot, in whole or in part, be removed from the state courts to a federal forum because it is not an action within the original jurisdiction of the district courts." *Id.* The court therefore concluded that, "if even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, or does not fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then as a consequence of § 1441(a), the whole action cannot be removed to federal court." *Id.* at 341.

In reaching that conclusion, the court took into account the possible applicability of section 1441(c) as an alternate basis for removal. *Id.* at 340 n.4. The court held that, under this subsection as well, the plain language of the statute created an insuperable barrier to removal. Judge Flaum, writing for the court, noted that the language of subsection (c) of the statute provided that "the entire case may be removed and the district court may determine *all* issues therein." Id. (emphasis added). Because the Eleventh Amendment and the *Hans* doctrine barred some of the claims from any adjudication in federal court, reasoned Judge Flaum, the district court could not determine "all issues therein." *Id.*

[18] It is unnecessary for us to determine whether these claims can be said to be grounded in § 1983.

In our case, the two complaints originally filed in the Circuit Court of Cook County and then removed to the district court contained federal constitutional allegations that arguably could have been removed to the district court had they been brought alone. The complaints also contained, however, requests for the review of the agency's actions in denying the specific permits for which the plaintiffs had applied. These latter matters, *grounded in state law*, were clearly subject to the judicial review process outlined in IARA and, therefore, the review in the Circuit Court of Cook County was limited to the administrative record. As we already have noted, such appellate review can hardly be characterized as a "claim" in an "original action." Under these circumstances, the case removed to the district court cannot be termed a "civil action . . . of which the district courts . . . have original jurisdiction" within the meaning of section 1441(a).

Nor do we believe that section 1441(c) provides an alternate basis for removal. Although the situation presented here is not identical in all respects to the situation presented in *Francis J.*, the basic reasoning of that case is applicable. Section 1441(c) permits removal only of otherwise non-removable "claims" or "causes of action." In the context of section 1441, which clearly contemplates the assumption of the responsibilities of a court of original jurisdiction by the district court, we think that these terms must be read to presuppose the existence of a "civil action." Therefore, because the district court cannot exercise original jurisdiction over "all issues therein," removal cannot be supported by section 1441(c).[14]

[14] We cannot accept, therefore, the submission that, because the College's complaints contain several challenges to the Chicago Landmark Ordinance arising under the federal constitution, the district court's jurisdiction in this case may be premised on 28 U.S.C. § 1331, the federal question statute. In effect, the defendants assert that these claims are separate and distinct from the arguments raised on administrative review. The defendants, in essence, argue that we should view the College's "Complaint for Administrative Review" as a claim for administrative review coupled with a removable "civil action . . . of which the district courts . . . have original jurisdiction." We note, however, that 28 U.S.C. § 1331, like the diversity statute, confers only "original jurisdiction of . . . civil actions." In this critical respect, therefore, there is no difference between federal question and diversity cases for purposes of applying the teachings of *Stude* and *Horton*. *See Trapp*, 373 F.2d at 383 ("An appeal from a state administrative board is not a 'civil action' as required by 28 U.S.C.A. § 1331 or § 1332.").

We hold, therefore, that the College's complaints for administrative review are not "civil action[s] . . . of which the district courts . . . have original jurisdiction" within the meaning of 28 U.S.C. § 1441(a). Removal of the complaints is barred, and the College's claims must be remanded to the Circuit Court of Cook County for determination. Accordingly, the judgment of the district court is reversed and the case remanded to the district court with instructions to remand cases 91 C 1587 and 91 C 5564—the College's complaints for administrative review—to the Cook County Circuit Court.[15]

REVERSED and REMANDED

A true Copy:

Teste:

Clerk of the United States Court
Appeals for the Seventh Circuit

[15] The district court also dismissed case 91 C 7849—the federal declaratory judgment action—with prejudice as moot and with leave to reinstate if the court's judgments in cases number 91 C 1587 and 91 C 5564 were vacated, reversed or remanded on appeal. In light of our holding, we remand case number 91 C 7849 to the district court so that it may determine, in the first instance, the appropriate treatment of this declaratory judgment action pending resolution of the College's administrative review claims.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Date: August 1, 1996

Before: HONORABLE WILLIAM J. BAUER, Circuit Judge
HONORABLE KENNETH F. RIPPLE, Circuit Judge
HONORABLE WALTER JAY SKINNER, District Judge *

Nos. 95-1315 & 95-1293

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,

Plaintiffs-Appellants

v.

CITY OF CHICAGO, a municipal corporation, COMMISSION ON CHICAGO LANDMARKS, Administrative Agency of the City of Chicago, PETER C.B. BYNOE, Commission Chairman, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 C 5564, John F. Grady, Judge

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* The Honorable Walter Jay Skinner of the United States District Court for the District of Massachusetts is sitting by designation.

JUDGMENT—WITH ORAL ARGUMENT

The judgment of the District Court is REVERSED, with costs, and the case is REMANDED, in accordance with the decision of this court entered on this date.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 1587

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

No. 91 C 5564

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

MEMORANDUM OPINION

This is a consolidated action for administrative review of a decision by the defendant Commission on Chicago Landmarks ("the Commission"), an agency of the City of Chicago. Plaintiffs are the International College of Surgeons ("ICS"), the United States Section of the ICS ("the U.S. Section"), and Robin Construction Corporation ("Robin"). Defendants are the City of Chicago ("the city"), the Commission, the Commission members, the commissioner of the city Department of Buildings,

and two nonprofit neighborhood organizations which participated in the administrative hearings as interested parties. Those organizations are the 1500 Lake Shore Drive Building Corporation and the North State, Astor, Lake Shore Drive Association.

In their First Amended Consolidated Complaint for Administrative Review, plaintiffs seek review of the Commission's decision denying four demolition permits and an economic hardship exception that would have allowed plaintiffs to tear down all but the front facades of two landmark buildings ICS and its U.S. Section now own on Lake Shore Drive in Chicago. Plaintiffs also raise several state and federal constitutional challenges to the city's ordinance governing the designation and preservation of landmark buildings ("the Landmarks Ordinance"), its ordinance designating the ICS property as a landmark building ("the Designation Ordinance"), and the Commission's application of the Landmarks Ordinance to the ICS property. For the reasons stated in this opinion, the court affirms the Commission's decisions and enters summary judgment for defendants on the remainder of plaintiffs' claims.

BACKGROUND

For much of the Nineteenth Century, Chicago's industrial and business elite lived in opulent mansions along Prairie Avenue on the city's South Side. But as bridges spread development north across the Chicago River, and as Chicago chugged its way toward becoming what Carl Sandburg dubbed "the city of the big shoulders," Prairie Avenue's proximity to the railroads and factories made it a less fashionable residential address. Led by pioneer entrepreneur Potter Palmer, many of the city's wealthiest persons moved to Lake Shore Drive around the turn of the century. Palmer's castle-like residence at 1350 North Lake Shore Drive is now gone, as are all but seven of the elegant homes that once lined the stretch of Lake Shore

Drive from Oak Street to North Avenue. On June 28, 1989, the Chicago City Council adopted the Designation Ordinance designating these seven houses in the 1200 and 1500 blocks of the Drive as historic landmarks. The "Seven Houses on Lake Shore Drive District" thus fell under the jurisdiction of the Commission on Chicago Landmarks, which has authority under the city's Landmarks Ordinance to grant or deny permits for the demolition or alteration of landmark buildings.

Two of the buildings in the "Seven Houses" district are owned by plaintiffs ICS and its U.S. Section. ICS is a 14,000-member nonprofit organization dedicated to the advancement of surgery and the education of surgeons worldwide. The Edward T. Blair House, a four-story mansion at 1516 North Lake Shore Drive, was designed by William Kendall of the New York architectural firm of McKim, Mead & White. Completed in 1914, the Blair House was purchased by plaintiff ICS in 1947 for $85,000.00 The Eleanor Robinson Countiss House, which at 1524 North Lake Shore Drive lies adjacent to the less spacious Blair House, was completed in 1917. Its architect, Howard Van Doren Shaw, modeled the house after the Petit Trianon, a three-story Versailles mansion built in 1770 for Louis XV's paramour, Madame de Pompadour. (To the dismay of some architectural purists, including Frank Lloyd Wright, Shaw added a fourth floor to the Countiss House.) ICS acquired the Countiss House in 1950 for $185,000.00. Both the Blair and Countiss houses have rear coach houses. ICS maintains offices in the Blair House and operates the "International Museum of Surgical Science" in the Countiss House.

ICS wants to demolish the rear, side and coach house portions of the properties so plaintiff Robin can build a 41-story mixed-use condominium tower on the site, leaving only the front facades of the original structures. Through a contract of sale of the Blair and Countiss houses to

Robin, ICS hopes to realize a return of $17 million. Authorized representatives of ICS signed that contract in February 1989, although the contract was contingent upon, among other things, final approval of ICS's Board of Governors. Plaintiffs' Appendix to Summary Statement of Facts and Memorandum of Law in Support of the Consolidated Complaint for Administrative Review ("Plaintiffs' Appendix"), Exh. 11 at ¶ 24. The ICS governing board ratified the contract on October 10, 1989. Report of Proceedings Re: Economic Hardship Exception Hearing ("Hardship Hearing Record"), at 34.[1] The dates are significant only insofar as defendants argue that adoption of the Designation Ordinance in June 1989 predated the final ratification of the contract by several months. On October 10, 1990, ICS applied to the Commission for four demolition permits that would allow ICS to demolish the coach houses and the side and rear portions of the Blair and Countiss houses. The Commission's permit process is set out in the city's Landmarks Ordinance [2] and the Com-

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[1] The record of the economic hardship hearing, which was held over several days in March and May of 1991 before the Commission, is broken into several lettered volumes. For the sake of clarity, the court will refer to the hearing transcripts and exhibits as the "Hardship Hearing Record" and will cite to the volume only where necessary to aid the reader. Volume A of the record consists of the demolition permit hearing transcript, which the court will refer to as the "Demolition Hearing Record."

[2] The ordinance provides that no city department may grant a permit for demolition or alteration of a landmark building without the Commission's written approval. Chicago Municipal Code, Ch. 2-120, § 740. It provides that the Commission should issue a "preliminary disapproval" of an application for such a permit if the Commission finds the proposed work "will adversely affect or destroy any significant historical or architectural feature of the improvement or the district or is inappropriate or inconsistent with the designation of the structure, area, or district, or is not in accordance with the spirit and purposes of this ordinance . . . ." *Id.*, § 780. Within 10 days of receiving notice of the preliminary dis-

mission's rules and regulations.[3] The Commission gave the permits preliminary disapproval on October 23, 1990, and

approval, the applicant may request an informal conference with the Commission "for the purpose of securing compromise regarding the proposed work so that the work will not in the opinion of the Commission adversely affect any significant historical or architectural feature of the improvement or district . . . ." *Id.*, § 790. If an informal conference does not result in an accord or if one is not requested, the application goes to a public hearing before the Commission, which then issues a written decision, containing findings of fact, approving or disapproving the application. *Id.*, § 800. The written decision is a final administrative decision appealable to the state court under the Illinois Administrative Review Law. *Id.*, § 810; 735 ILCS 5/3-101 *et seq.* If the Commission makes a final decision to deny a permit, the applicant may ask the Commission for an "economic hardship" exception "on the basis that the denial of the permit will result in the loss of all reasonable and beneficial use of or return from the property." Chicago Municipal Code, Ch. 2-120, § 830.

[3] The Commission's regulations governing demolition permit applications in landmark districts call for the agency to evaluate whether the property sought to be demolished contributes to the character of the district. Rules and Regulations of the Commission on Chicago Landmarks, Art. IV(C)(1). Factors to be considered include whether the subject property exhibits the "critical features" of landmark designation, and whether it has the general site characteristics, size, shape and scale associated with the landmark district. *Id.* After a permit has been denied, issues relevant to an application for an economic hardship exception include: the applicant's knowledge of the landmark designation at the time of acquisition; the current level of economic return on the property (including the date of purchase, the purchase price, income from the property, any remaining mortgage debt, real estate taxes, and recent appraisals of the property); any recent offers for sale or purchase; and the infeasibility of profitable alternative uses for the property (including the economic feasibility of rehabilitating or reusing the building as is). *Id.*, Art. V(A)(1-4). The applicant for an economic hardship exception carries the burden of proving by clear and convincing evidence "that the existing use of the property is economically infeasible and that the sale, rental, or rehabilitation of the property is not possible, resulting in the property not being capable of earning any reasonable economic return." *Id.*, Art. V(C).

conducted a public hearing on December 18, 1990. After the hearing, the four demolition permits then received the Commission's final disapproval on January 9, 1991. ICS then applied for an economic hardship exception, and the Commission held a public hearing on March 5, March 7, May 7 and May 8 of 1991. On July 3, 1991, the Commission issued its final written denial of an economic hardship exception.

This action is here on removal from the state court, given plaintiffs' federal constitutional claims that the Landmarks Ordinance, the Designation Ordinance, and the Commission's conduct of the administrative procedures violated various of plaintiffs' federal due process and equal protection rights. In a memorandum opinion dated January 10, 1992 ("Memorandum Opinion"), this court dismised with prejudice several of plaintiffs' equal protection and due process claims, including the claim that the Landmarks Ordinance effected an unconstitutional "taking" of plaintiffs' property. Several claims remain. Plaintiffs claim that the Designation Ordinance violated plaintiffs' federal and state equal protection and due process rights by unfairly treating the subject properties differently from other properties with respect to landmark status. They also argue that the Commission violated equal protection and due process by conducting the demolition hearing in a biased and unfair manner. The rest of plaintiffs' claims arise exclusively under state law. Plaintiffs contend the Landmarks Ordinance violates the separation of powers doctrine derived from the Illinois Constitution by improperly delegating legislative power to the Commission. They argue that the Landmarks Ordinance, on its face and as applied by the Commission also constituted a wrongful "taking" without just compensation under the Illinois Constitution. In addition, plaintiffs argue that the Designation Ordinance constitutes unlawful "special legislation" in violation of the Illinois Constitution, and that ICS has vested rights in the proposed development of the 41-story project. Finally, plaintiffs seek administrative review of the Com-

mission's July 3, 1991, final decision denying plaintiffs the economic hardship exception they needed to proceed with the development.

This opinion will analyze the federal claims and then move on to the state claims, over which the court will exercise supplemental jurisdiction. With regard to the complaint for administrative review, Illinois law grants to the trial court the power to affirm or reverse the administrative agency in whole or in part. 735 ILCS 5/3-111(5). Such a decision is made on the basis of the administrative record. The parties have treated plaintiffs' federal and state challenges to the administrative decisions and the ordinances underlying the procedures as ripe for decision on the record, in effect asking the court to determine whether summary judgment on those issues is appropriate. Accordingly, the court will treat those claims as if cross-motions for summary judgment are pending, since the parties have had a full opportunity to submit exhibits, affidavits and other evidence.[4] The record now consists of

[4] There is no summary judgment motion pending. However, plaintiffs have represented to the court that all their claims, including those raising federal constitutional issues, may be resolved on the record and without a trial as a part of the administrative review of the Commission's decisions. *See* Transcript of Proceedings, March 31, 1993, at 4; Plaintiffs' Reply Memorandum of Law in Support of Consolidated Complaint for Administrative Review ("Plaintiffs' Reply"), at 2. District courts may grant summary judgment *sua sponte* " 'when the outcome is clear, so long as the opposing party has had an adequate opportunity to respond.' " *Sawyer v. United States*, 831 F.2d 755, 759 (7th Cir. 1987) (quoting *Smith v. DeBartoli*, 769 F.2d 451, 452 (7th Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986)). The Seventh Circuit generally instructs the district court to notify the parties of its intentions to grant or consider summary judgment, so that an adequate opportunity to respond may be had. *English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993). But in this case, at the March 31, 1993, status hearing, plaintiffs' counsel actually encouraged the court to decide the entire matter on the record. At a subsequent status hearing, the court inquired as to whether plaintiffs had sufficiently developed the record as to certain issues, and plaintiffs' counsel

hundreds of pages of administrative hearing transcripts and exhibits, to which the parties have referred in their briefs. The briefs themselves amounted to nearly 300 pages, not including exhibits.

ANALYSIS

I. Plaintiffs' Federal and State Equal Protection and Due Process Claims

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). A "genuine issue of material fact exists only where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.' " *Dribeck Importers, Inc. v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). In considering such a motion, the court must view all inferences in the light most favorable to the nonmoving party. *See Regner v. City of Chicago*, 789 F.2d 534, 536 (7th Cir. 1986).

A. The Designation Ordinance Did Not Violate Plaintiffs' Federal Equal Protection Rights.

Plaintiffs' first federal claim alleges that the city, through its Designation Ordinance creating the "Seven Houses" landmark district, has unfairly singled out ICS

responded that "[e]ither we did or we didn't, but we are bound by the record in my mind." Transcript of Proceedings, April 21, 1993, at 13. The court finds plaintiffs had notice that the case would be decided in a summary judgment posture. Plaintiffs also had an adequate opportunity to respond, and they chose to stand on the record. Therefore it is appropriate for the court to treat the case as if cross-motions for summary judgment were pending.

and treated its properties differently than similarly situated properties. Specifically, plaintiffs argue that the "Seven Houses" designation protects every facade of every building, whereas the city's 1985 designation of the nearby East Lake Shore Drive District protects only the landmark buildings' portions that can be seen from the public way. Plaintiffs also argue that the city violated their equal protection rights by refusing their proposed changes to the Blair and Countiss houses while allowing certain structural changes to other buildings within the "Seven Houses" district. Third, plaintiffs argue that the Designation Ordinance "arbitrarily groups seven noncontiguous buildings" into the landmark district when the seven "cannot even be viewed as one unified district" and when the district does not include other landmark-quality buildings located among the seven on the same stretch of Lake Shore Drive.

When the court denied a motion to dismiss this equal protection claim in January 1992, the court's opinion cited *Falls v. Town of Dyer*, 875 F.2d 146, 148 (7th Cir. 1989). The basic assumption behind plaintiffs' claim is that a statute or government action may violate equal protection by creating a class of one. In essence, this theory of equal protection holds that when the government singles out an individual for differential treatment, that act itself creates a classification that may violate the equal protection clause, even if the individual plaintiff is not actually a member of a disfavored class of individuals, as would be the case in the traditional approach to equal protection. *See Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992) (explaining *Falls* without resolving its tension with cases requiring equal protection claims to be based on plaintiff's membership in a class). But in *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), *aff'd*, —— U.S. ——, 114 S.Ct. 807 (1994), the Seventh Circuit implicitly overruled *Falls* when it held that "the state's act of singling out an individual for differential treatment does *not* itself create the class." *Id.*

(emphasis in original) (internal quotation marks omitted). *See also Lucien v. Peters*, 840 F. Supp. 591, 593 (N.D. Ill. 1994) (noting that under Seventh Circuit's *Albright* opinion, allegations of individual—and not class-based—discrimination are insufficient to make out an equal protection claim); *Lucas v. Village of LaGrange*, 831 F. Supp. 1407, 1417 (N.D. Ill. 1993) (same).

Plaintiffs, perhaps wisely, do not cite *Falls*. But the theory behind their equal protection claim is a *Falls*-type theory. Plaintiffs are alleging that the city has singled out ICS, as an individual property owner, for disparate treatment. This sort of claim cannot survive after *Albright*. Moreover, plaintiffs' own photographic exhibits appear to show that the south-facing facade of the Blair House is visible from Lake Shore Drive, and that the house's side, rear and coach house are visible from the public alley[8] in

[8] Illinois courts have interpreted the phrase "public way" as "'an area accessible to the public.'" *People v. Pennington*, 172 Ill. App.3d 641, 527 N.E.2d 76, 78 (2d Dist. 1988) (quoting *People v. Ward*, 95 Ill. App.3d 283, 419 N.E.2d 1240, 1244 (2d Dist. 1981)). In *Pennington*, the Illinois Appellate Court held that a privately owned sidewalk adjacent to a college dormitory was a "public way." for purposes of the state's aggravated battery statute, because the sidewalk was accessible to the public and was commonly used as a walkway by college students. *Id.* A number of state courts have held that alleys are public ways. *See, e.g., Western Union Tel. Co. v. Dickson*, 173 S.W.2d 714, 717 (Tenn. Ct. App. 1941) ("Streets and alleys are both public ways intended primarily for the use of the public in passing to and fro. For most purposes the only difference between them is width."); *Kansas City S. Ry. v. Boles*, 115 S.W. 375, 377 (Ark. 1908) ("alleys were held to be one of the public ways under the control of the municipal authorities"); *Johnston v. Lonstorf*, 107 N.W. 459, 461 (Wis. 1906) ("An alley of small dimensions actually used by only a limited number of persons, but which the public have a general right to use therefore may be regarded as a public way."). Courts have held particular pathways or passages to be outside the definition of "public way" when they are not traversed by persons, *see Jefferson County v. South Cent. Bell Tel. Co.*, 555 S.W.2d 629, 632 (Ky. Ct. App. 1977) (sewage easement was not "public way" because it was designed to accommodate the flow of sewage, and not the passage of people), or

the rear of the building. *See* Hardship Hearing Record, Vol. D, Exhs 306, 313. A portion of the north-facing facade of the Countiss House also appears to be visible from Lake Shore Drive. *See id.*, Vol. F, Exh. 403. And while the city allowed changes to other buildings in the "Seven Houses" district, there is no dispute that these were relatively minor interior and exterior changes, and nothing on the order of the demolition of all but the front facades, as plaintiffs wish to alter their property. *See* Defendants' Memorandum in Support of Their Response to Plaintiffs' Consolidated Complaint for Administrative Review ("Defendants' Memorandum"), Exh. L.

As to plaintiffs' claim that the "Seven Houses" district was arbitrarily drawn because it consists of separate blocks and excludes other buildings between those blocks, plaintiffs cite the testimony of Carroll William Westfall, an architectural historian. Westfall testified before the Commission that the district is "predominantly weighted in favor of houses" and that the Designation Ordinance's drafters "failed then to look for the tall buildings that could fill out and explain the actual history of North Lake Shore Drive by a reasonable designation . . . . And more realistically, all of the buildings on North Shake [sic] Shore drive and predating1930 ought to be included in the district." Report of Proceedings Re: Demolition Permit Application Hearing Held December 18, 1990 ("Demolition Hearing Record"), at 147. Westfall's testimony, however, fails to create a genuine issue as to whether the Designation Ordinance was arbitrary, as plaintiffs' argue.

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when they are not generally accessible to the public without permission of private property owners. *See Green Bay and W. R.R. Co. v. Transportation Comm'n*, 365 N.W.2d 909, 910 (Wis. Ct. App. 1985) (snowmobile trails across private property could not be regulated as "public ways" because of "the transient nature of the public's right to use the trails" for purposes other than snowmobiling). These cases aptly demonstrate that the public alley behind the ICS properties is a "public way," within the generally understood meaning of that term.

Plaintiffs do not dispute that the "Seven Houses" district includes structures originally built as houses, not multi-family buildings or high-rises, and that the seven houses in the district are the last such mansions remaining on the Drive between Oak Street and North Avenue. *Id.* at 168-69. Historians such as Westfall might prefer that a landmark district commemorate the history of Lake Shore Drive as a whole, or of residential living on the Drive in general. But that does not mean the city acted arbitrarily in shaping the district to preserve what it refers to as "the swan song of a particular period of residential architecture for North Lake Shore Drive." Defendants' Memorandum, Exh. D at 11. Plaintiffs' evidence does not genuinely dispute that the houses in the 1200 and 1500 blocks of the Drive "stand as valuable reminders of an illustrious part of the past of this famous street. Taken individually, each portrays the work of a distinguished and celebrated American architect. Collectively, each block strongly conveys the historical and aesthetic image of late nineteenth- and early-twentieth century Lake Shore Drive." *Id.* Westfall admitted as much on cross-examination. Demolition Hearing Record at 177.

These undisputed facts about the "Seven Houses" district also defeat plaintiffs' argument that the East Lake Shore Drive District, which is composed of high-rises, is "similarly situated." Therefore it is immaterial that the city has, as plaintiffs point out, permitted a high-rise redevelopment on the Mayfair Hotel property on East Lake Shore Drive. In short, the question of whether the city has "singled out" the ICS properties is not material, after *Albright*, for purposes of plaintiffs' equal protection argument. Even if that question were material, there is no genuine dispute that the city did not single out the Blair and Countiss houses or treat them differently than other similarly situated properties through the Designation Ordinance.

B. Plaintiffs' "Singling Out" Claim Also Fails Under Federal Due Process and State Constitutional Law.

Plaintiffs' also advance the same arguments in support of their claim that the Designation Ordinance violated their federal substantive due process rights and state constitutional rights to due process and equal protection. The state and federal due process claims fail for the reasons stated above, as plaintiffs have not demonstrated a genuine issue as to whether the Designation Ordinance was arbitrary or capricious. The state equal protection argument falls along with the federal claim, that Illinois courts generally analyze equal protection in the same way as do federal courts. *See Illinois Housing Dev. Auth. v. Van Meter*, 82 Ill.2d 116, 412 N.E.2d 151, 152-53 (1980) ("If a suspect classification or fundamental right is not found, the legislation simply must bear a rational relationship to a legitimate government interest.").

The language of *Van Meter* does suggest that the Illinois courts might be more generous than the Seventh Circuit regarding plaintiffs' "singling out" argument. In that vein, plaintiffs concede that the Designation Ordinance creates no suspect classification, but they argue that their property rights are "fundamental" for purposes of the equal protection analysis in *Van Meter*. But *Van Meter* listed the right to travel, the right to vote, and the right to fair treatment in the criminal process as "fundamental" rights. *Id.* at 152-53. Even if that list is not all-inclusive, plaintiffs' right against the alleged disparate treatment of their property would not be deemed "fundamental" in this sense. Fundamental rights "are those that 'lie at the heart of the relationship between the individual and republican form of nationally integrated government.'" *Committee for Educ. Rights v. Edgar*, —— Ill. App. 3d ——, 641 N.E.2d 602, 606 (1st Dist. 1994) (quoting *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483,

470 N.E.2d 266, 277 (1984)). For example, in *Van Meter*, the Illinois Supreme Court declined to consider a person's right to find adequate housing as fundamental. *Van Meter*, 412 N.E.2d at 153.

So with no suspect classification or fundamental right at issue, the Illinois courts would apply a rational relationship test to plaintiffs' "singling out" argument. Plaintiffs have not produced evidence that would allow a reasonable trier of fact to reach any conclusion other than that the preservation of the last seven mansions on North Lake Shore Drive is a legitimate goal, or that the Designation Ordinance bears a rational relationship to that goal. Westfall, who was plaintiffs' primary witness on this point, admitted that the history of the seven mansions should be preserved, and that the "Seven Houses" district preserved them. Demolition Hearing Record at 176-77.

C. Plaintiffs Present No Triable Issue as to Whether Their State and Federal Due Process Rights Were Violated by the Commission's Alleged Bias.

Plaintiffs also contend that their state and federal due process and equal protection rights were violated by the way the Commission conducted the administrative proceedings. Essentially, plaintiffs argue that the city and the Commission conferred landmark status on the Blair and Countiss houses and then denied plaintiffs a fair administrative hearing as part of an ongoing, deliberate effort to squelch plaintiffs' plans to redevelop the property into a high-rise. As evidence, plaintiffs cite "[t]he Commission's actions, as described throughout this brief." Plaintiffs' Summary Statement of Facts and Memorandum of Law in Support of the Consolidated Complaint for Administrative Review ("Plaintiffs' Memorandum"), at 107.

Plaintiffs begin by referring to the Commission's written denial of the economic hardship exception. Plaintiffs cite

page 27 of that document for the proposition that the defendants knew of plaintiffs' plans to redevelop the Blair and Countiss houses prior to the enactment of the Designation Ordinance. Plaintiffs' Memorandum at 107. But that page simply outlines the notice and hearing procedures the Commission followed in its consideration of whether to recommend that the City Council designate the seven houses as landmarks. Plaintiffs' Appendix, Exh. 6 at 27. Also, the Commission's knowledge of plaintiffs' redevelopment plans does not in itself support the inference that the Commission or the city deliberately set out to destroy those plans.

Plaintiffs' brief goes on to discuss the alleged inadequacy of notice of the city's consideration of the Designation Ordinance, and the Commission's refusal during the demolition permit hearings to receive evidence concerning plaintiffs' redevelopment plans. Viewing these facts with inferences drawn in the light most favorable to plaintiffs, the court cannot conclude that they create a genuine issue as to whether the city acted under some grand plan aimed more at stopping the development than at preserving landmarks. What plaintiffs need is evidence that would allow a trier of fact to find an ulterior motive on behalf of the city or the Commission. For example, plaintiffs might have demonstrated a genuine issue had they produced evidence that the Blair and Countiss houses did not deserve landmark status but received it anyway, or that the city designated only the Blair and Countiss houses, ignoring other similarly situated landmark properties. Notwithstanding plaintiffs' fruitless argument that the "Seven Houses" district was drawn arbitrarily, plaintiffs do not dispute that the district includes all seven of the remaining mansions from the Potter Palmer era, and that the Blair and Countiss houses are worthy of landmark designation. Moreover, the court already ruled in January 1992 that the Commission's notice procedures under the Landmarks Ordinance

do not on their face deny due process, and that the Commission's refusal to receive the redevelopment evidence did not violate due process. Memorandum Opinion at 12-13.

Despite the court's 1992 ruling, plaintiffs revive their due process argument that the Commission did not give them fair notice that the city was considering a preliminary landmark designation that would encumber plaintiffs' property rights. Plaintiffs' argument is now recast as an "as applied" challenge. Obviously, if the city deviated from an otherwise constitutional set of procedures by failing to give proper notice or postdeprivation process, plaintiffs' due process rights could be violated. But there is no such evidence in the record here. The city's initial notice to plaintiffs came in a June 1, 1988, letter informing ICS that its property was being considered for landmark designation. Plaintiffs argue that the letter did not discuss the ramifications of preliminary designation or offer ICS an opportunity to be heard. After reading the letter, the court disagrees. The letter states the date, time and place of an upcoming Commission meeting (one month later) at which the Commission "will make a decision on whether or not to pursue designation for the Seven Houses on Lake Shore Drive . . . ." Plaintiffs' Appendix, Exh. 9. The letter lists the specific addresses of the Blair and Countiss houses. *Id.* It specifically states that the meeting is "open to the public" and that ICS should "please feel free to attend." *Id.* The letter's failure to invite comment explicitly does not render it constitutionally inadequate, and even if the letter were inadequate, it does not establish that plaintiffs did not receive meaningful postdeprivation process at the Commission's subsequent April 26, 1989, public hearing, which ICS attended. *See id.*, Exh. 6 at 27; Memorandum Opinion at 12-13 (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985)). Plaintiffs have failed to establish a genuine issue of material fact relative to their argument that the Commission's actual notice constituted an "as applied" due process violation.

In another attempt to restructure an argument previously rejected by the court, plaintiffs argue that their due process rights were infringed when the Commisison refused at the demolition permit hearing to consider evidence of the proposed redevelopment of the ICS property. But they advance no reason why the court should decide the question any differently than it did in its January 1992 opinion, which was based on the irrelevance of the redevelopment evidence to the central issue before the Commission: whether the Blair and Countiss houses, in their current state (and not in the state they would be *after* the proposed redevelopment), contributed to the character of the "Seven Houses" district. *See* Memorandum Opinion at 13. The same reasoning defeats plaintiffs' argument that the Commisison was biased and violated due process when it refused, during the demolition permit hearing, to allow plaintiffs to cross-examine witness Dennis McFadden about the proposed redevelopment.

Plaintiffs offer a variety of other evidence to support their argument of Commission bias, but none of it establishes a genuine issue. Plaintiffs complain that Westfall was not permitted to testify about the purported flaws in the designation of the "Seven Houses" district. While the record shows the Commission's chairman refused to hear Westfall's testimony to that effect, *see* Demolition Hearing Record at 155, Westfall still was permitted to give ample testimony about his opinion that the district was poorly drawn and underinclusive for its lack of high-rise buildings. *Id.* at 147-48, 173.

Plaintiffs find Commission bias in the chairman's statement during the demolition hearing that "[t]he Commission has two witnesses that we would like to present to give testimony opposing the applicant's request for demolition permits." *Id.* at 186-87. The chairman later stated that "I maybe used the word 'we' too freely." *Id.* at 188. In any event, plaintiffs are grasping at straws here, and the offhand statements or misstatements of the Commission chairman do not establish a genuine issue. *Cf. United*

States v. Dumont, 936 F.2d 292, 297 (7th Cir.) ("Extemporaneous speech by a judge who may not have been paying attention to nuance does not preclude a more considered decision later."), *cert. denied*, 112 S.Ct. 399 (1991).

Plaintiffs also argue unfair bias stemming from the Commission's retention of two expert witnesses who testified at the demolition hearing. But it is well-established under federal and state law that in the administrative setting, some mixture of judicial and prosecutorial function is acceptable and does not, without more, violate due process. *See Vukadinovich v. Board of School Trustees*, 978 F.2d 403, 412 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 133 (1993); *Sharma v. Zollar*, —— Ill. App.3d ——, 638 N.E.2d 736, 743 (1st Dist. 1994). Plaintiffs must overcome the presumption that the administrative adjudicators are persons " 'of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' " *Vukadinovich*, 978 F.2d at 412 (quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1975)). Plaintiffs present much argument but no evidence to overcome this presumption. They present no evidence that Commission members, who actually ruled on the demolition permits, themselves performed any quasi-prosecutorial role. *See Sharma*, 638 N.E.2d at 743-44. Moreover, the Commission allowed counsel for ICS to conduct a vigorous cross-examination of one of the Commission's witnesses, Howard Decker, on the issue of bias. Demolition Hearing Record at 235-37. The Commission's retention of the witnesses did not render the proceeding unfair so as to deny plaintiffs due process.

Plaintiffs next point to the Commission's refusal to hear evidence or hold a hearing on a substitute designation ordinance that ICS suggested as a means of changing the boundaries of the "Seven Houses" district. In recommending the denial of the substitute ordinance on January 9, 1991, the Commission noted that ICS had presented "no new evidence" that would support an amendment of the

district boundaries. Plaintiffs' Appendix, Exh. 5. Plaintiffs complain that this ground for decision defies due process because the Commission refused to hold a hearing at which new evidence could be received. But there appears to be little or no connection between plaintiffs' attempts to change the district boundaries and the question of whether due process was observed during the enactment of the original Designation Ordinance or during the permit and economic hardship exception hearings. At the time they sought the amendment, their buildings had already been designated as landmarks. The change in legal status occurred with the enactment of the original Designation Ordinance in June 1989, and prior to that, in April 1989, plaintiffs were afforded a predeprivation hearing which they do not now challenge. Due process generally is not violated if the deprivation of a protected property interest takes place after a proper notice and hearing. *See Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

Finally, plaintiffs argue that the Commission violated due process by granting "interested party" status to the two defendent neighborhood organizations during the administrative hearings, and by denying the demolition permits without making its own written findings of fact as required by the city's Landmarks Ordinance. Plaintiffs cite no authority for the proposition that these actions constitute the sort of Commission bias that would so infect the proceedings as to violate due process. As to the interested parties, plaintiffs cite *Landmarks Preservation Council v. City of Chicago*, 125 Ill.2d 164, 531 N.E.2d 9 (1988). But the *Landmarks* case merely held that two organizations with no more than an aesthetic interest in the underlying litigation did not have standing in the lawsuit. *Id.* at 13. It does not support plaintiffs' arguments concerning commission bias or due process, and it does not bar the Commission from granting "interested party" status to such organizations during public hearings "as a tool to assist the municipality in performing its legislative

function." *Id.* at 14.[6] As to the Commission's denial of the demolition permits, the Commission expressly incorporated a set of written findings into its decision. Plaintiff's Appendix, Exh. 5. These findings were drafted by the Commission staff rather than by the Commission members, but that does not violate due process or the city's Landmarks Ordinance. Once the Commission adopted the findings, they became the findings of the Commission. Plaintiffs cite *Gimbel v. Commodity Futures Trading Comm'n*, 872 F.2d 196 (7th Cir. 1989), in which the Seventh Circuit spoke disapprovingly of an administrative law judge's adoption of findings of fact prepared by the agency's enforcement division, which had brought the administrative action. *Id.* at 198-99. In this case, only ICS and the two neighborhood organizations were parties to the action. Had the Commission adopted a set of findings drafted by the interested parties, ICS might have a good argument that the Commission failed to make its own independent findings. But the Commission's adoption of the written findings prepared by its own staff does not establish bias on the part of the Commission.

Taken individually and collectively, plaintiffs' cited examples of alleged bias by the Commission, when viewed in light of the undisputed facts, do not amount to a state or federal due process or equal protection violation, for the reasons stated above. The court will therefore enter summary judgment in favor of the defendents on all of the remaining federal claims in the case. Although the court has discretion under 28 U.S.C. § 1367(c) to decline to exercise jurisdiction over the remaining state claims, *see Carnegie-Mellon Univ. v. Cohill*, 484 U.S.

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[6] Plaintiffs cite the Commission chairman's statement that the *Landmarks* case "seems to run contrary to our ordinance and our regulations," Demolition Hearing Record at 7, but they do not point out that the chairman made that statement after counsel for ICS summarized the *Landmarks* case without distinguishing between standing to bring suit and standing to participate in a public hearing. *Id.* at 6.

343, 350-51 (1988), the court will continue to exercise supplemental jurisdiction, in the interest of judicial economy, fairness and comity. *See Timm v. Mead Corp.*, 32 F.3d 273, 276-77 (7th Cir. 1994). This case is more than three years old, and, like the court in *Timm*, this court sees "no need to delay the resolution of this matter (and add to the burdens of the Illinois court system) by having the parties litigate the . . . state law issues anew in state court." *See id.* at 277. Clearly, the exercise of jurisdiction would best serve the interests of economy, convenience, fairness and comity in this case. This court's considerable investment of time into the case places it in the best position to resolve the remaining issues expeditiously.

II. Plaintiffs' Remaining State Law Claims

A. The Landmarks Ordinance Does Not Violate State Nondelegation Principles and Is Not Unconstitutionally Vague.

Plaintiffs attack the Landmarks Ordinance as vague and as a violation of the Illinois Constitution's provisions concerning the separation of powers. Plaintiffs complain in particular that the Landmarks Ordinance does not provide adequate standards for the Commission in making landmark designations, in reviewing permit applications, and in considering applications for economic hardship exceptions. By not providing clear, intelligible standards, the Landmarks Ordinance unconstitutionally delegates legislative power to the Commission, plaintiffs argue.

The Illinois constitutional doctrine of separation of powers provides that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. art. I, § 1. According to the Illinois Supreme Court, a valid delegation of legislative authority to an administrative agency requires that the legislative body provide sufficient indication of (1) the persons and activities potentially subject

to regulation; (2) the harm sought to be prevented; and (3) the general means intended to be available to the administrator to prevent the identified harm. *Stofer v. Motor Vehicle Casualty Co.*, 68 Ill.2d 361, 369 N.E.2d 875, 879 (1977). As to the first requirement, the legislature must do all that is practical to define the scope of the legislation, so interested parties have notice of the possibility that aministrative actions may affect them. *Id.* But what is "practical" may be limited by the complexity of the subject being regulated. *Id.* As to the second requirement, lawmakers may use "somewhat broader, more generic language" than required for the first element, and it is sufficient if the types of harm sought to be prevented by the statute are apparent from its language. *Id.* As to the third requirement, the legislature must specifically enumerate the administrative tools and the particular sanctions, if any, that are intended to be available to the agency. *Id.*

The court has little difficulty concluding that the Landmarks Ordinance satisfies the test enunciated in *Stofer*. In enumerating the Commission's powers and duties, the ordinance charges the agency, among other things, with "identifying those areas, districts, places, buildings, structures, works of art, and other objects of historic or architectural significance," and with advising and assisting "owners or prospective owners of designated or potential landmarks or structures in landmark districts on technical and financial aspects of preservation, renovation, rehabilitation, and reuse . . . ." Chicago Municipal Code, Ch. 2-120, § 610 (1990). Plaintiffs argue that this provision insufficiently describes the persons or activities to be regulated because it does not define what constitutes a landmark. However, delegation standards should not be treated in isolation, but in light of the purpose, factual background and context of the statute. *People v. Carter*, 97 Ill.2d 133, 454 N.E.2d 189, 191 (1982) (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)), *appeal dismissed*, 465 U.S. 1055 (1984). Another provision of the ordinance lists seven criteria which

the Commission is supposed to apply in considering whether a building or district should be a landmark:

> —Its value as an example of the architectural, cultural, economic, historic, social or other aspect of the heritage of the City of Chicago, State of Illinois, or the United States.
>
> —Its location as a site of a significant historic event which may or may not have taken place within or involved the use of any existing improvements.
>
> —Its identification with a person or persons who significantly contributed to the architectural, cultural, economic, historic, social, or other aspect of the development of the City of Chicago, State of Illinois, or the United States.
>
> —Its exemplification of an architectural type or style distinguished by innovation, rarity, uniqueness, or overall quality of design, detail, materials, or craftsmanship.
>
> —Its identification as the work of an architect, designer, engineer, or builder whose individual work is significant in the history or development of the City of Chicago, State of Illinois, or the United States.
>
> —Its representation of an architectural, cultural, economic, historic, social, or other theme expressed through distinctive areas, districts, places, buildings, structures, works of art, or other objects that may or may not be contiguous.
>
> —Its unique location or distinctive physical appearance or presence representing an established and familiar visual feature of a neighborhood, community, or the City of Chicago.

Chicago Municipal Code, Ch. 2-120, § 160 (1990).

The above criteria, coupled with the stated purposes of the statute, make clear the persons and activities which may be regulated under the Landmarks Ordinance. The criteria also clearly identify the harm sought to be prevented, despite plaintiffs' meritless argument that the ordinance is insufficient because it identifies only the converse proposition, or the benefits to be gained from landmark designation and preservation. *See Gray v. Department of Labor*, 176 Ill. App.3d 285, 531 N.E.2d 32, 35 (3d Dist. 1988) (inferring, from statute's langauge requiring the payment of the prevailing hourly rate to construction workers on certain public works improvements, that statute sought to prevent the harm of substandard work on public projects) *appeal denied*, 124 Ill.2d 554, 535 N.E.2d 914 (1989); *Friendship Facilities, Inc. v. Region 1B Human Rights Auth.*, 167 Ill. App.3d 425, 521 N.E.2d 578, 581 (3d Dist. 1988) (holding that statute enacted to safeguard the federal and state constitutional rights of disabled persons sufficiently indicated the types of evil the statute was designed to prevent). Finally, the Landmarks Ordinance's enumeration of the Commission's powers and duties adequately sets out the means by which the Commission may fulfill the purposes of the ordinance. The statute empowers the Commission to identify buildings for landmark designation; to recommend that the City Council designate such buildings; to review proposals to alter, destroy or add to landmarks; and to consider landowners' pleas that landmark status works an economic hardship upon them. *See* Chicago Municipal Code, ch. 2-120, § 610.

With respect to permit review, § 800 provides that the Commission's final written decision must contain the factual findings "that constitute the basis for the decision, *consistent with the criteria in § 2-120-740.*" *Id.*, § 800 (emphasis added). Section 740 provides that written Commission approval is required for any permit concerning a landmark structure when the following criteria are present:

> (1) where such permit would allow the alteration or reconstruction of or addition to any improvement which constitutes all or part of a landmark or proposed landmark;

(2) where such permit would allow the demolition of any improvement which constitutes all or part of a landmark or proposed landmark; or

(3) where a permit would allow the construction or erection of any addition to any improvement or the erection of any new structure or improvement on any land within a landmark district; or

(4) wheer a permit would allow the construction or erection of any sign or billboard within the public view which may be placed on, in or immediately adjacent to any improvement which constitutes all or part of any landmark or proposed landmark.

Id., § 740. Plaintiffs in effect argue that while these criteria may define the categories of permit applications that are subject to Commission review, they do not guide the Commission in how to exercise that review. Although that might be true if § 740 stood alone, the court cannot read § 740 in isolation. Section 800, by requiring the Commission's final written decision on permit applications to be "consistent with" the criteria in § 740, obviously instructs the Commission to consider whether a proposed permit would result in the alteration or destruction of a landmark. The Commission in this case followed that instruction when it denied plaintiffs' permit application to tear down all but the front facades of the Blair and Countiss Houses, having determined that the other exterior facades should be preserved because they constituted "critical features" of the landmark. Therefore the concept of "critical features" is not made up out of whole cloth, as plaintiffs contend. Instead it is a criterion that appropriately implements the ordinance by providing a reasonable basis for distinguishing between those proposed alterations that are "consistent with" preservation of the landmark and those that are not.

With respect to the Commission's consideration of an economic hardship exception once a permit has been denied, the statute defines the basis for the exception as

a showing that the denial of the permit deprives the applicant of "all reasonable and beneficial use of or return from the property." *Id.*, §§ 830, 850. The statute then authorizes the Commission to develop regulations 'that describe factors, evidence and testimony that will be considered by the Commission in making its determination." *Id.*, § 830. The Commission's regulations set out a variety of relevant factors and require the applicant to bear the burden of proving by clear and convincing evidence that "the existing use of the property is economically infeasible and that the sale, rental or rehabilitation of the property is not possible, resulting in the property not being capable of earning any reasonable economic return." Rules and Regulations of the Commission on Chicago Landmarks, Art. V; *see supra*, n. 3. As is the case with the criteria governing the Commission's permit review, the court concludes that the statute adequately describes the means by which the Commission is to carry out the ordinance's purposes, under the third prong of *Stofer*. Plaintiffs argue that the words "all reasonable and beneficial use of or return from the property" are subject to myriad interpretations, but in fact they describe a relatively technical concept in the field of land use. Indeed, several of the witnesses at the economic hardship hearing gave specific testimony and opinions regarding whether landmark status deprived plaintiffs of "all reasonable and beneficial use of or return from" the Blair and Countiss houses. Reading the ordinance as a whole, the court concludes that it clearly describes the persons and activities subject to Commission regulation, the Commission's mission and the means available to carry out that mission. Therefore the city's administrative scheme for landmarks does not run afoul of the separation of powers doctrine under the Illinois Supreme Court's analysis in *Stofer*.

Plaintiffs' challenge to the ordinance relies heavily on the argument that the criteria for landmark designation are too vague to give the Commission adequate guidance in designating landmarks and thus in administering the

ordinance. With respect to the criteria enumerated in § 620, "theme" can mean virtually anything, and almost any building can be argued to have contributed to some "aspect of development" somewhere in the United States, plaintiffs argue. But this argument ignores the complex interrelationship between architecture, history, economics and cultural and social factors. It suggests, for example, that the first brick bungalow erected on a given Northwest Side street could be designated a landmark because it had historical significance in the development of that street, and thus the city. But the ordinance instructs the Commission to look to a milieu of considerations, and it is this milieu that would distinguish our hypothetical bungalow from, say, the South Side bungalow where the late Richard J. Daley resided.

Under the Landmarks Ordinance, the Commission sits as a sort of expert panel to help the City Council identify landmarks for designation, and to review permits for reconstruction, alteration or demolition of landmarks. So long as the statute sets intelligible standards for the Commission, it does not violate nondelegation principles. *Hill v. Relyea*, 34 Ill.2d 552, 216 N.E.2d 795, 797 (1966). To make the agency's standards "intelligible," the legislature need not establish "[a]bsolute criteria whereby every detail necessary in the enforcement of a law is anticipated." *Id.* Illinois courts recognize that the precision of the standards will vary along with "the nature of the ultimate objective and the problems involved." *Id.* In *Hill*, a statute authorized the superintendent of a state mental hospital to discharge an involuntarily committed patient "as the welfare of such person and of the community may require . . . ." *Id.* at 796. The Illinois Supreme Court upheld the statutory provision as a valid delegation of power, in recognition of the superintendent's expertise in determining when a patient may safely be released. *Id.* at 797-98. Here, the Landmarks Ordinance has put forth an intelligible set of standards for the Commission to consider in determining whether a structure

warrants landmark protection. The nature of the ordinance's objectives and the complexity of the problems with which the ordinance is concerned negate the need to set more precise standards. *See id.* at 798. Although *Hill* predates *Stofer*, it is in accord with *Stofer's* pragmatic approach to analyzing delegation problems. As the Illinois Supreme Court stated in *Stofer*, "[i]n many cases, it is simply impractical for legislators to become and remain thoroughly apprised of the facts necessary to determine which aspects of that activity are harmful and how they might be modified." *Stofer*, 369 N.E.2d at 878. Citing *Hill*, the Illinois Supreme Court in *People v. Carter*, 97 Ill.2d 133, 454 N.E.2d 189 (1982), *appeal dismissed*, 465 U.S. 1055 (1984), analyzed a delegation of power to an executive branch agency without using the *Stofer* approach. *Carter* involved a challenge to the Franchise Disclosure Act's provision allowing the state attorney general to grant exemptions from the Act "if he finds that the enforcement of this Act is not necessary in the public interest." *Carter*, 454 N.E.2d at 190. The court held that the "in the public interest" standard, when considered in conjunction with the statute's overall purposes and context, "is an intelligible standard which survives constitutional scrutiny." *Id.* at 190-91. The administrative scheme in this case provides significantly more guidance for the agency than did the "in the public interest" standard in *Carter* and the "welfare" standard in *Hill*.

Plaintiffs cite *Waterfront Estates Dev. Inc. v. City of Palos Hills*, 232 Ill. App.3d 367, 597 N.E.2d 641 (1st Dist. 1992), in which the Illinois Appellate Court held unconstitutional a municipal ordinance providing that certain building permits could not be issued without approval from an "appearance commission." *Id.*, 597 N.E.2d at 646. Approval of the "appearance commission" hinged on whether the proposed building "will be inappropriate to, or incompatible with, the character of the surrounding neighborhood." *Id.* at 647. The court held these standards to be inadequate under the state's nondelegation doc-

trine and constitutional standards of vagueness. *Id.* at 648-49. Plaintiffs attempt to draw an analogy between the Landmarks Ordinance and the language of the ordinance in *Waterfront Estates*. But the Landmarks Ordinance, when viewed as a whole, provides a far more detailed set of instructions to the agency than did the municipal ordinance at issue in *Waterfront Estates*. Although it is true that the Landmarks Ordinance uses the terms "inappropriate" and "inconsistent" to guide the Commission in whether to give preliminary disapproval to a permit application, *see* Chicago Municipal Code, Ch. 2-120, § 780, the Commission's permit review criteria also may be found in § 800 and § 740, as discussed above. Section 780 also specifically refers to the "spirit and purposes" of the ordinance, which are listed in § 580. Moreover, whether an improvement or demolition is "inappropriate" or "inconsistent" with respect to a landmark or landmark district, within the context of the goals of the Landmarks Ordinance, is a more specific, technical issue than whether a general building permit in a residential neighborhood is "inconsistent" or "incompatible with" that neighborhood. A whole set of different concerns is at play in the landmarks context, and the ordinance spells out those concerns in its statement of purposes. *Id.*, § 580. Therefore the court does not view *Waterfront Estates* as controlling in this case. Curiously, the *Waterfront Estates* court did not cite *Hill* or *Stofer*, although it appeared to follow the *Hill* approach. *Waterfront Estates*, 597 N.E.2d at 646. In any event, there is considerable overlap between the *Hill* and *Stofer* approaches, and under either, the Landmarks Ordinance does not violate nondelegation principles of the Illinois Constitution.

As to plaintiffs' vagueness challenge, Illinois courts follow the rule that an ordinance is unconstitutional if it is "so vague that persons of common intelligence must necessarily guess at its meaning." *Waterfront Estates*, 597 N.E.2d at 649 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973)). For the same reasons the Landmarks

Ordinance provides the Commission with intelligible standards, it also is not unconstitutionally vague. The ordinance does not require persons of common intelligence to guess at its meaning. *See Coronet Ins. Co. v. Washburn*, 201 Ill. App.3d 633, 558 N.E.2d 1307, 1312 (1st Dist. 1990).

There being no genuine dispute as to the issue of vagueness and unlawful delegation of legislative power, summary judgment on those issues is appropriate.

B. The Designation Ordinance Is Not Unlawful Special Legislation.

Plaintiffs attack the Designation Ordinance as "special legislation" forbidden by Article IV, Section 13 of the Illinois Constitution. But the Illinois Supreme Court has held that the same standards applied in federal and state equal protection analysis are used to determine whether a statute constitutes unlawful special legislation. *Van Meter*, 412 N.E.2d at 155 (citing *S. Bloom, Inc. v. Mahen*, 61 Ill.2d 70, 76-77, 329 N.E.2d 213 (1975)). "Thus, the special legislation section of the Illinois Constitution allows differentiations between similarly situated persons if the classification bears a rational relationship to a legitimate legislative purpose." *Van Meter*, 412 N.E.2d at 155 (citing *Anderson v. Wagner*, 79 Ill.2d 295, 315, 402 N.E.2d 560 (1979) *appeal dismissed*, 449 U.S. 807 (1980)).

Part I(B) of this opinion concluded that the Designation Ordinance did not offend state concepts of equal protection, and the same analysis applies to plaintiffs' special legislation argument. There is no genuine dispute as to whether preserving the last seven mansions on Lake Shore Drive from Oak Street to North Avenue is a legitimate governmental objective, or whether the Designation Ordinance is rationally related to that goal. Plaintiffs again argue that there is no difference between the mansions in the "Seven Houses" district and other nondesignated

buildings along that stretch of Lake Shore Drive or buildings designated as part of the East Lake Shore Drive District. Plaintiff's Memorandum at 102. But the undisputed facts do not support that argument. As the court concluded earlier in this opinion, the undisputed facts show that the "Seven Houses" district's inclusion of the last remaining mansions from the Potter Palmer era distinguish it from the other buildings in the area and on East Lake Shore Drive. Therefore those other property owners are not "similarly situated" with respect to plaintiffs, and even if they were, the Designation Ordinance passes the rational relationship test. By disposing of plaintiffs' special legislation argument in this fashion, the court does not reach defendants' arguments that the special legislation provision does not apply to municipalities.

C. The Landmarks Ordinance's Economic Hardship Provisions, On Their Face and As Applied, Do Not Amount to a "Taking" Under the Illinois Constitution.

In its January 1992 ruling, this court rejected plaintiffs' facial and as-applied challenges to the Landmarks Ordinance under the federal constitutional prohibition against uncompensated takings. Memorandum Opinion at 7-10. Defendants now contend that the Court also ruled on plaintiffs' state constitutional takings claims. But the opinion clearly addressed only the federal takings issues. *Id.* Plaintiffs argue that the state takings clause affords property owners more protection than the federal clause, and that the economic hardship provisions of the Landmarks Ordinance effected a taking in violation of the state constitution.

We can begin with the premise that the Illinois Constitution provides greater protection to landowners than does the federal takings clause. The cases cited by plaintiff do support this proposition. *See St. Lucas Ass'n v. City of Chicago*, 212 Ill. App. 3d 817, 571 N.E.2d 865, 875 (1st

Dist. 1991); *Equity Assocs., Inc. v. Village of Northbrook*, 171 Ill. App.3d 115, 524 N.E.2d 1119, 1126 (1st Dist.), *appeal denied*, 122 Ill.2d 573, 530 N.E.2d 243 (1988); *Department of Transp. v. Rasmussen*, 108 Ill. App.3d 615, 439 N.E.2d 48, 54 (2d Dist. 1982). But plaintiffs' briefs stop short of probing the nature of the additional protection, and defendants simply counter that the additional protection does not extend to regulatory zoning, without explaining why. The text of the Illinois Constitution of 1970 provides that "[p]rivate property shall not be *taken or damaged* for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." Ill. Const. art. I, § 15 (emphasis added).[7] The federal takings clause provides only that "nor shall private property be *taken* for public use without just compensation." U.S. Const. amend. V (emphasis added). Therefore the textual difference between the two provisions is the state constitution's prohibition of uncompensated "damage" to property.

The words "or damaged" were added to the state constitution in 1870 to allow for compensation to landowners who sustained harm to their property rights as a result of activities that did not amount to takings. *Rasmussen*, 439 N.E.2d at 54. But the Illinois courts have interpreted "damage" under § 15 to require a "direct physical disturbance" peculiar to the property. *Id. Equity Assocs.*, another case relied on by plaintiff, illustrates this point. In *Equity Assocs.*, the defendant Village of Northbrook had

[7] For purposes of the court's analysis, § 15 of the 1970 state constitution does not differ in relevant part from the Illinois Constitution of 1870, in which railroads received special treatment and the right to a jury determination was not available when the state was the condemnor. *See* Ill. Const. of 1870 art. II, § 13. At the state constitutional convention in 1970, the drafters considered and rejected a proposal to add to § 15 the phrase "or the use thereof impaired" after the word "damaged" in the first sentence. Robert A. Helman & Wayne W. Whalen, Constitutional Commentary, S.H.A. Const. Art. I, § 15.

filed an earlier suit against the plaintiff developers and Cook County to enjoin the issuance of a county building permit for an office development on land adjacent to the village's boundary. *Equity Assocs.*, 524 N.E.2d at 1121. Plaintiffs argued that the village's suit had prevented them from developing the property and thus constituted "damage" under § 15, but the Illinois Appellate Court affirmed the lower court's dismissal of the complaint. *Id.* at 1124. "Plaintiffs' arguments that defendants' actions prevented them from exercising their rights to 'physically' develop or use their property miss the point. It is a physical disturbance to property, not the prevention of its physical development, which constitutes damage requiring just compensation." *Id.* (citing *Rigney v. City of Chicago*, 102 Ill. 64 (1881)). *St. Lucas Ass'n*, the third case cited by plaintiffs in the case at bar, cited *Rigney* and *Citizens Util. Co. v. Metropolitan Sanitary Dist.*, 25 Ill. App.3d 252, 322 N.E.2d 857 (1st Dist. 1974), for the statement that the Illinois Constitution is broader than the United States Constitution on the question of takings. *St. Lucas Ass'n*, 571 N.E2d at 875. But *Rigney* and *Citizens Util. Co.* both discuss "damage" as a "direct physical disturbance of a [property] right." *Rigney*, 102 Ill. at 81; *Citizens Util. Co.*, 322 N.E.2d at 861. Admittedly, a physical disturbance to "a right" may appear to be different and perhaps broader than a physical disturbance to the property itself. *See id.* More recent Illinois cases such as *Rasmussen* and especially *Equity Assocs.*, however, have not recognized any such distinction.

In this case, the parties dispute the effect of landmark designation on the fair market value of the Blair and Countiss properties. But plaintiffs have presented no evidence that defendants caused any direct physical disturbance to their property rights. As the Illinois Appellate Court held in *Equity Assocs.*, an interference with plaintiffs' right to "physically" develop the property is not enough. Plaintiffs here have shown nothing more than this. Perhaps that explains why plaintiffs never directly

argue that the Landmarks Ordinance or the Commission's actions caused compensable "damage" to the property under § 15. But no other argument is available to support their contention that the broader protection of the Illinois Constitution entitles them to relief.

To the extent plaintiffs argue that the Landmarks Ordinance and the Commission's actions under the ordinance constituted a "taking" under the Illinois Constitution, the Illinois cases dictate roughly the same analysis as this court's approach to plaintiffs' federal takings claims. In short, land-use regulations do not amount to a taking unless they deprive the landowner of all or substantially all economically viable uses of the property. *See Tim Thompson, Inc. v. Village of Hinsdale*, 247 Ill. App.3d 863, 617 N.E.2d 1227, 1243-45 (2d Dist.), *appeal denied*, 152 Ill.2d 581, 622 N.E.2d 1229 (1993); *St. Lucas Ass'n*, 571 N.E.2d at 876. In *Tim Thompson*, a developer wanted to build three single-family houses on three lots, but the defendant city enacted a zoning ordinance increasing the minimum lot size so that only two homes could be built on the property. *Tim Thompson*, 617 N.E.2d at 1231-33. The Illinois Appellate Court reasoned that the developer still had an economically viable use for the property, and that the city did not effect a taking by denying the developer its "optimally desired" use of the land. *Id.* at 1245. Even though the developer could not realize as much profit from the project as it had originally anticipated, it could at most allege at diminution of value of the parcel, and such allegations were insufficient to state a takings claim. *Id.* In *St. Lucas Ass'n*, the owners of a cemetery tried unsuccessfully to change the zoning of part of the property from single-family residential to allow commercial development. They then challenged the denial as a taking under § 15. Following *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1977), the Illinois Appellate Court held that the denial of the zoning change was not a taking because nothing in the record showed

that it would not be economically viable for the owners to use that portion of the cemetery property as a commercial greenhouse, a use permitted by the existing zoning. *St. Lucas Ass'n*, 571 N.E.2d at 876.

Plaintiffs' facial challenge to the Landmarks Ordinance fails because they do not dispute that the basis for economic hardship exceptions to permit denials under the ordinance is a showing that the denial "will result in the loss of all reasonable and beneficial use of or return from the property." Chicago Municipal Code, Ch. 2-120, § 830. This standard does not violate Article I, § 15 of the Illinois Constitution because it allows the exception to be granted if the permit denial prevents a landowner from having any viable economic use for his or her property. Plaintiffs' as-applied challenge fails because plaintiffs do not genuinely dispute that in spite of their inability to obtain the demolition permits necessary for their proposed redevelopment, they still have an economically viable use for the Blair and Countiss houses as a corporate headquarters or museum.

Although plaintiffs argue that they cannot afford to maintain the Blair and Countiss houses without redeveloping the property into a high-rise, testimony from their own witnesses showed that the lack of funding for the property's upkeep is not due to the Landmarks Ordinance, but to plaintiff ICS's unwillingness to provide the money. When asked by plaintiffs' counsel why ICS would be unwilling to make substantial contributions to maintain and restore the property, ICS World President John Stuart Penton Lumley testified that "the college members look on their commitment to surgical development rather than bricks and mortar and maintaining landmarks. This is, I think, understandable being a surgeon." Hardship Hearing Record at 283. He testified further: "We have asked our members—and I have emphasized that the members themselves think that their finances should go towards surgery and not maintenance of the building." *Id.* at 300.

ICS does not wish to mortgage the property, Lumley testified, because "you actually have to pay it back sometime. Therefore, you are taking on a hell of a headache for the whole of your future generation." *Id.* at 302. Plaintiffs' counsel also elicited from Dr. Pedro A. Rubio, head of ICS's U.S. Section, testimony that generating funds for rehabilitating the Blair and Countiss houses would be "almost impossible" because "physicians don't have as much money as they used to, and they are using it for purposes that are more important than fixing a building." *Id.* at 351.

The foregoing testimony demonstrates that there is no genuine dispute over whether ICS can continue its current use of the buildings. Plaintiffs have presented evidence that ICS does not *want* to fund the maintenance of the buildings because of other priorities. They have not presented evidence that ICS *cannot* maintain the buildings. Even if such evidence were presented, it would probably establish only that the impediment to an economically viable use stemmed from ICS's own particular financial situation or its strategy in maintaining the buildings, and not from any action by the defendants under the Landmarks Ordinance.[8] The court doubts that such a situation

[8] Plaintiffs cite a construction consultant's estimate that rehabilitating the building would cost more than $7 million. But the author of this estimate, dubbed the "Morgan Report," admitted that his estimates included furniture and furnishings and were based on "institutional quality," or "bring[ing] the buildings up to the obvious quality level at which they started." Hardship Hearing Record at 197, 200. Another of plaintiffs' witnesses testified that for $480,000.00, the buildings could be sealed from any water damage for 25 to 30 years. *Id.* at 160. The ultimate cost of repair needed for the buildings to continue in their current use is disputed by the parties, but that dispute is not material to the question of whether the Landmarks Ordinance or its application by the Commission deprived plaintiffs of all economically viable uses. Otherwise a property owner could deliberately neglect its property, or even damage it, and then claim that land-use regulations effect a taking because the property is so far gone—for reasons unrelated

would constitute a "taking" under federal or state law. Moreover, the court's conclusion that no genuine dispute exists with regard to the economic viability of plaintiffs' continued use of the buildings as an office and museum is supported by the undisputed evidence that ICS and its U.S. Section pay no property taxes on the buildings and own them free and clear of any mortgage. *Id.* at 89. These facts leave ICS to argue that staying in two buildings in one of Chicago's toniest districts facing Lake Michigan, while paying no rent, mortgage debts or taxes, would not be economically viable. Many property owners would envy such an arrangement.

The United States Supreme Court's recent decision in *Dolan v. City of Tigard*, —— U.S. ——, 114 S.Ct. 2309 (1994), does not change this court's takings analysis. *Dolan* concerned "exactions," or the extent to which local governments may condition the granting of building permits on the applicant's surrender of some particular property right. The Court in *Dolan* held that unless the exaction bears a "rough proportionality" to the impact of the development for which the permit is sought, the exaction is a taking for which the owner must be compensated. *Id.* at 2319. Unlike cases in which land-use regulations limited a property owner's use of its own parcel of land, *Dolan* involved a requirement that the owner actually deed a portion of its property to the local government. *Id.* at 2316.[9] So although plaintiff cites *Dolan*'s discussion of

to the regulations—that the owner's proposed redevelopment is the only remaining viable use.

[9] Notably, though, the Court in *Dolan* recognized that a taking can occur even if the government's confiscatory action leaves the owner with "*some* economic use from her property." *Id.* at 2316 n.6 (emphasis in original). But the Court was speaking of a situation, not present in this case, in which the government actually confiscates a portion of the property, leaving the owner with a usable remnant. *Id.* In *Dolan*, the plaintiff wanted to increase the size of the retail store she owned on property lying within a floodplain. As a condition for the building permit, the local government required plaintiff to dedicate a 15-foot strip of land next to the floodplain for use as a pathway for walking and bicycling. *Id.* at 2314.

Illinois law on when an exaction constitutes a taking, that discussion is inapposite here because this is not an exaction case.

For these reasons, the record in this case does not present a genuine dispute as to whether the Landmarks Ordinance, on its face or as applied by the Commission, violated the takings provision in § 15 of the Illinois Constitution. As this court ruled in January 1992 with respect to plaintiffs' federal takings challenge, the Landmarks Ordinance "does not affect plaintiffs' ability to continue using the subject property as a corporate headquarters or museum." Memorandum Opinion at 9 (citing *Penn Central*, 438 U.S. at 121).

D. Plaintiffs Are Not Entitled to Relief Under the Illinois Doctrine of "Vested Rights."

Plaintiffs next contend that they should be allowed to proceed with their planned redevelopment of the Blair and Countiss houses because they have vested rights in the project. They argue that the negotiations leading to ICS's redevelopment contract with Robin were based on existing zoning that unquestionably permitted their proposed 41-story high-rise. Plaintiffs had no reason to think that potential or eventual landmark designation would block the project, they argue, because of a representation in a Commission staff report (tendered to plaintiffs in June 1988) that designation would affect only the portions of the buildings visible from the public way. The city and the Commission then changed their stance in 1989 by designating all of the facades, including those not visible from the public way, plaintiffs maintain.

The Illinois common law doctrine of vested rights allows landowners or developers to proceed with a planned con-

struction project based on the original zoning when they have substantially changed their position, made substantial expenditures, or incurred obligations with respect to the project in good-faith reliance on a building permit or the probability of its issuance. *Cos Corp. v. City of Evanston*, 27 Ill.2d 570, 190 N.E.2d 364, 367-68 (1963); *Fifteen Fifty N. State Bldg. Corp. v. City of Chicago*, 15 Ill.2d 408, 155 N.E.2d 97, 101 (1958). But the doctrine does not apply where the landowner makes the expenditures after receiving notice of proposed zoning changes, *see Tim Thompson, Inc. v. Village of Hinsdale*, 247 Ill. App.3d 863, 617 N.E.2d 1227, 1237 (2d Dist.), *appeal denied*, 152 Ill.2d 581, 622 N.E.2d 1229 (1993), or where there is a unresolved question over what may be built under the land-use regulations. *Bank of Waukegan v. Village of Vernon Hills*, 254 Ill. App.3d 24, 626 N.E.2d 245, 251-52 (2d Dist. 1993), *appeal denied*, 156 Ill.2d 555, 638 N.E.2d 1112 (1994). The vested rights doctrine is grounded in the desire to avoid the "grave injustice" of allowing municipal officials to deny development rights by changing the rules in the middle of the game. *Cos Corp.*, 190 N.E.2d at 368.

Although the record does not precisely spell out the nature and extent of expenses plaintiffs incurred during the negotiation, execution and ratification of the contract with Robin in 1989, defendants do not dispute that those expenditures were substantial.[10] Rather, defendants maintain that plaintiffs could not have relied on the probability of gaining the necessary permits because they did not apply for the permits until October 1990, more than a

[10] The record includes precious little evidence of substantial expenditures by plaintiffs in reliance on the city's representations. Defendants do not challenge plaintiffs on this issue. However, the Commission's unwillingness to hear evidence of the redevelopment, at the administrative hearing stage, may explain this gap in the record. In any event, the court does not need to reach this issue because the vested rights question can be decided on another ground: whether plaintiffs could have had a reasonable expectation that the necessary permits would issue.

year after the Designation Ordinance had been enacted. Indeed, in several of the Illinois cases in which vested rights were found, the developers' plans or permit applications were in compliance with zoning regulations as they existed at the time the applications were submitted. *See Cos Corp.*, 190 N.E.2d at 366; *O'Connell Home Builders, Inc. v. City of Chicago*, 99 Ill. App.3d 1054, 425 N.E.2d 1339, 1344 (1st Dist. 1981); *People ex rel. First Nat'l Bank & Trust Co. v. Village of Deerfield*, 50 Ill. App.2d 349, 200 N.E.2d 120, 121 (1st Dist. 1964). In the case at bar, it is undisputed that when plaintiffs applied for the four permits needed to demolish portions of the Blair and Countiss mansions and their rear coach houses, the Designation Ordinance was already in effect, so plaintiffs could not have relied on the issuance of the permits that had yet to be considered by the Commission. Plaintiffs also can point to no change in the legal status or designation of their property after they applied for the permits.

But plaintiffs' argument runs somewhat deeper than defendants recognize. Plaintiffs argue that their development rights vested more than two years before they actually applied for the permits. When the city first began the process of designating the Blair and Countiss houses as part of the landmark "Seven Houses" district, the Commission sent its June 1, 1988, letter (discussed in Part I(C) of this opinion), to ICS notifying it of pending proceedings. Plaintiffs' Appendix, Exh. 9. The letter incorporates by reference a "staff analysis of landmark criteria applicable to the district." *Id.* Plaintiffs point to the final sentence of the four-page staff analysis: "As is the case with all districts designated by the Commission, critical features are defined as only those parts of the buildings visible from the public way." *Id.* That sentence, according to plaintiffs, gave rise to the probability that the necessary demolition permits would issue so long as the development plan did not call for the alteration of the front facades of the Blair and Countiss houses. *See* Plaintiffs' Reply at 42.

Plaintiffs argue that they relied on that sentence when they negotiated the 1989 contract with Robin. The city's subsequent designation of *all* exterior facades as "critical features" of the landmarks, *see* Defendants' Memorandum, Exh. E, § 1, marked a change in the city's stance after plaintiffs' rights in the development already had vested, plaintiffs maintain. Plaintiffs' Reply at 42-43.

Although the record does not detail plaintiffs' "substantial" expenditures in reliance on the representation in the staff analysis, the record is well-developed with regard to the notice plaintiffs received in 1988 about the city's plans to designate the Blair and Countiss houses as landmarks. By focusing on the staff analysis exclusively, plaintiffs ask the court to take a myopic view of the record. The Commission's June 1 letter, to which the staff analysis was attached, told ICS that a decision would be made on July 6, 1988, as to whether the Commission would pursue the designation of the "Seven Houses" district. "Should the Commission decide to pursue designation," the letter continued, "we will again write you to fully explain the reasons for and the effects of landmark designation as well as the various steps involved in the process." Plaintiffs' Appendix, Exh. 9. The letter added that "no final decision is taken until the Commission has first held an informal public meeting for property owners and later a formal public hearing on the matter." *Id.*

After the Commission gave the district "preliminary designation" on July 6, it dispatched a letter dated the same day to ICS. The July 6 letter informed ICS that any permit applications from that point on would have to be reviewed by the Commission. *Id.*, Exh. 10. Echoing the statement in the staff analysis, the July 6 letter then said, "the Commission is only concerned with permits relating to those parts of the buildings visible from the public way," but it also stated that the Commission's review authority "applies both to alterations to existing structures and for new construction within historic districts." *Id.*

The letter continued: "We urge that, should you be contemplating any changes to your property, you call the Commission staff to discuss these in advance." *Id.*

The critical question here is whether the city's representations could give rise to a good-faith reliance by plaintiffs on the probability of permits being issued for their proposed development. The answer must be no. The Commission's June 1 and July 6 letters, coupled with its July 6 decision to include the Blair and Countiss houses within the preliminary designation of the "Seven Houses" district, unquestionably raised a cloud over plaintiffs' development rights.[11] From that point on, plaintiffs had notice that their development could not proceed without receiving permit approval from the Commission. The two letters did *not* say that the Commission would approve any permit for alteration or destruction of all but the front facades of the landmark houses. They did not say the Commission would not later decide to deem the rear, side and coach house portions of the ICS property to be critical features. They *did* say that no final decisions had been made and that any construction-related changes to the property would have to be approved by the Commission. The July 6 letter went so far as to "urge" ICS to contact the Commission staff if ICS contemplated "any changes" to the property.

Admittedly, the letters muddied the water by saying the Commission was concerned only with what could be seen

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[11] Defendants argue that such a cloud already existed as early as 1982, when the Illinois Department of Conservation placed the Blair and Countiss houses on the Illinois Register of Historic Places. *See* Hardship Hearing Record at 62. But defendants do not seriously contend that the 1982 state designation encumbered plaintiffs' property rights or did anything more than signal to plaintiffs that their longstanding redevelopment plans might have to overcome objections from preservationists. It is undisputed that the first notice to ICS of designation interest on the part of the city or the Commission—the agencies with the power to approve the needed permits—came on July 1, 1988.

from the public way. But the fact that they did not signal a clear entitlement to the type of permits plaintiffs later sought makes the case analogous to *Bank of Waukegan*. In *Bank of Waukegan*, a developer wanted to build an apartment building on a piece of property that at one time was subject to a "special-use" zoning classification that allowed apartments. But the special-use zoning was tied to an annexation agreement that had expired. *Bank of Waukegan*, 626 N.E.2d at 248. The developers argued they had vested rights because, at the time they made substantial expenditures, the special-use zoning was on the village maps. *Id.* at 250. The developers also noted that they had obtained a copy of a letter, written by a colleague of the village attorney, stating that the special-use zoning was still in effect. *Id.* at 247-48, 251. On the other side of the scales, the village manager had told one of the developers he believed the special-use zoning had expired, and the village president had stated at a public meeting that he believed the property's zoning was in question. *Id.* at 251. The Illinois Appellate Court held that on these facts, the trial court properly denied the developers' plea for declaratory relief on the ground of vested rights. *Id.* at 251-52. The court reasoned that "while the developers had received definite indications" that their project was permissible under the zoning, "there was always a question as to what the property's zoning classification was in the minds of the parties." *Id.* at 251. The court added:

> A reading of the record shows that instead of proceeding cautiously and making sure that all "i's" were dotted and "t's" were crossed with regard to zoning when the developers ran into problems, Mr. Parikh [the developers' agent] simply went ahead with the developers' plans based on his own belief that a special-use permit was still in force for the property. As noted, the village added a certain amount of fuel to Mr. Parikh's fire, but it did not lead him to believe that the zoning question was a closed one.

Id. at 252.

The same reasoning is applicable to the case at bar, where the undisputed facts show that the defendants' representations to plaintiffs would not lead a reasonable person to rely on the issuance of the necessary demolition permits.[12] The instigation of designation proceedings instead raised a host of questions over future development rights with respect to the Blair and Countiss houses, despite the language plaintiffs argue they relied on. Plaintiffs here needed to dot the "i's" and cross the "t's," because as one Illinois court put it, a vested right is "more than a mere expectation based on anticipation of the continuance of existing zoning law; it must have become a title, legal or equitable, to the present or future enjoyment of property." *County of Kendall v. Aurora Nat'l Bank*, 219 Ill. App.3d 841, 579 N.E.2d 1283, 1289 (2d Dist. 1991), *appeal denied*, 143 Ill.2d 639, 587 N.E.2d 1016 (1992). In addition, plaintiffs are hard-pressed to argue that they did not know during contract negotiations of the possible impact of the city's designation plans on their development rights, given that the contract itself requires Robin to pay all of ICS's legal fees "for services rendered in connection with Seller's efforts in opposing City of Chicago landmark status for the Property . . . ." Plaintiffs' Appendix, Exh. 11 at ¶ 16; *see also id.* at ¶ 2 (making title subject to "any pending proceedings by the City of

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[12] There is no dispute that plaintiffs' redevelopment proposal would be allowed under the property's zoning, which did not change with the landmark designation. The analogy to *Bank of Waukegan* lies in the city's land-use regulations as a whole, including the procedures for Commission review of applications for permits to demolish portions of landmark structures. The cloud over the special-use zoning in *Bank of Waukegan* is like the cloud over whether plaintiffs here could obtain Commission approval for the permits needed to redevelop the Blair and Countiss houses into a 41-story building.

Chicago for imposing city landmark status and possible City of Chicago landmark status"). The contract bears a date of February 1989. Any contention that plaintiffs did not know at that time that possible landmark designation could affect the right to develop the property is untenable given the wording of the contract. Moreover, even if the demolition permits that were necessary after enactment of the Designation Ordinance could be said to have been a sure thing, it is undisputed that plaintiffs still needed Chicago Plan Commission approval under the city's Lakefront Protection Ordinance, and their application for that approval remained pending at the time of the economic hardship hearing in May 1991. Hardship Hearing Record at 413.

This case is unlike those in which Illinois courts have applied the doctrine of vested rights. In *Constantine v. Village of Glen Ellyn*, 217 Ill. App.3d 4, 575 N.E.2d 1363 (2d Dist. 1991), the defendant village's building and zoning official had told the plaintiff landowners that their lot, though small, was buildable, and that he would issue them a building permit, but the village subsequently denied the permit because the lot was too small. *Id.* at 1365-66. In *O'Connell*, the defendant city amended the zoning restrictively after plaintiff had applied for a building permit that would have been issued under the zoning in effect at the time of the application; there was no evidence that the plaintiff knew or could have known of the amendment. *O'Connell*, 425 N.E.2d at 1343. In *Cos Corp.*, the defendant city told the plaintiff its building plans complied with the zoning and included sufficient parking spaces, but the city subsequently delayed acting on the permit application for several months and amended the zoning to increase the number of required parking spaces more than threefold. *Cos Corp.*, 190 N.E.2d at 366-67. In each of these cases, the plaintiffs had unequivocal indications that their projects could move forward and had no way of knowing that the defendant municipalities were

about to scotch the projects by changing the land-use laws. But in the case at bar, the undisputed facts show plaintiffs had adequate notice of the impending landmarks designation, and of the uncertainty such a designation would create with respect to plaintiffs' plans to redevelop their properties. There being no genuine issue of material fact as to whether plaintiffs had vested rights, the court will enter summary judgment on this claim.

III. Plaintiffs' Complaint for Administrative Review

A. Standard of Review

The heart of plaintiffs' administrative review complaint is its plea for reversal of the Commission's July 3, 1991, final decision denying plaintiffs' application for an economic hardship exception that would have allowed them to destroy all but the front facades of the Blair and Countiss houses, despite the landmark status of the property. Unlike the court's *de novo* review of plaintiffs' other federal and state law claims, review of the administrative agency's action is governed by the Illinois Administrative Review Law, 735 ILCS 5/3-101 *et seq.*

The Administrative Review Law provides that the agency's findings of fact on review "shall be held to be prima facie true and correct." 735 ILCS 5/3-110. Illinois courts define the scope of review as an inquiry into whether the agency's findings are against the manifest weight of the evidence. *Launius v. Board of Fire & Police Comm'rs*, 151 Ill.2d 419, 603 N.E.2d 477, 481 (1992), *cert. denied*, 113 S.Ct. 2337 (1993). To find the agency's decision was against the manifest weight of the evidence, the reviewing court "must be able to conclude that all reasonable and unbiased persons, acting within the limits prescribed by the law and drawing all inferences in support of the finding, would agree that the finding is erroneous, and that the opposite conclusion is clearly evident." *O'Boyle v. Personnel Bd.*, 119 Ill. App.3d 648, 456 N.E.2d 998, 1002 (1st Dist. 1983) (internal quotation

marks and citation omitted). The agency's factual determinations therefore are not against the manifest weight of the evidence "unless there is a complete absence of facts in the record supporting the conclusion reached." *Ross v. Civil Serv. Comm'n*, 250 Ill. App.3d 597, 621 N.E.2d 159, 163 (1st Dist. 1993). The reviewing court must not re-evaluate the credibility of the witnesses who testified before the agency. *Id.* It must not reweigh the evidence or substitute its own judgment if substantial evidence supports the agency's judgment. *Hall v. Board of Educ.*, 227 Ill. App.3d 560, 592 N.E.2d 245, 255 (1st Dist. 1992). In short, reversal of the agency is not justified simply because the reviewing court believes it might have ruled differently or believes in the reasonableness of the conclusion opposite from the agency's. *Id.*; *O'Boyle*, 456 N.E.2d at 1002-03.

In denying plaintiffs' application for an economic hardship exception, the Commission made ten findings upon its consideration of "the entire record." *See* Plaintiffs' Appendix, Exh. 6 at 11-29. Five of the findings were in support of the Commission's conclusion that denial of the demolition permits did not deprive plaintiffs of all reasonable and beneficial use of the Blair and Countiss houses. The other five were in support of the Commission's conclusion that plaintiffs were not deprived of all reasonable and beneficial return from the property. Plaintiffs argue that each of the findings is against the manifest weight of the evidence or is arbitrary and capricious.

B. The Commission's Conclusion That Plaintiffs Were Not Deprived of All Reasonable and Beneficial Use of the Property Was Not Against the Manifest Weight of the Evidence.

1. Evidence Supported the Commission's Finding That the Landmark Designation of Plaintiffs' Property Does Not Prevent Plaintiffs' Traditional Use of That Property.

The Commission's written decision stated that plaintiffs never questioned, during the administrative hearings, the suitability of the Blair and Countiss houses, in their current condition, for use by ICS as a headquarters and museum. *Id.* at 11. The Commission observed that because the landmark status of the property affected only the exteriors of the buildings, and not the interiors, landmark designation did not affect ICS' ability to continue using the buildings as it had for more than 40 years. *Id.* at 12. In addition, the Commission noted plaintiffs' argument that landmark status was imposing more than $7 million in repairs upon ICS in order for it to maintain its existing use of the buildings. *Id.* The Commission dismissed the argument, stating "there is nothing mandated by landmark designation which requires an owner to maintain property in any manner greater" than that provided by city building codes. *Id.*

As observed earlier in this opinion, there is ample evidence in the record to support the conclusion that landmark status is not an impediment to the continued use of the property as a headquarters and museum. Landmark status did not change the fact that ICS owns the property free and clear of any mortgage or property tax obligations. Hardship Hearing Record at 89. Clearly the record was devoid of evidence that landmark status, resulting as it did in the denial of demolition permits for plaintiffs' plan to raze all but the front facades of the property, in any way regulated or changed the manner in which ICS had been using the buildings. The only real issue here is

whether ICS was prevented from continuing its existing use because of the allegedly prohibitive cost of repair. But as noted earlier in this opinion, plaintiffs' own evidence included testimony by high-ranking ICS officials that the organization and its membership simply are not committed to financing the upkeep of its buildings. *Id.* at 283, 300, 302, 351. Plaintiffs correctly point out that the evidence overwhelmingly showed that repairs need to be made. But such evidence does not show that landmark designation precludes ICS from making the repairs. Plaintiffs argue that in considering an economic hardship application, the Commission "must take the owner and the property as it finds them," Plaintiffs' Reply at 54, but even if the court accepts that proposition, there is no evidence that the Commission did not do exactly that.

Moreover, evidence in the record supports the Commission's finding that the Morgan Report's $7.2 million repair estimate included work that was far beyond what was required under the building code and that was not mandated by the landmark status of the property. *See supra,* n.8. The estimate included the cost of landscaping; repaving outdoor concrete and brick walkways; "miscellaneous site work" for as yet undiscovered problems; replacing gutters and downspouts; refinishing of wood floors to their original quality; bringing marble surfaces to their original quality; refinishing wood paneling and restoring a set of elaborate wood cabinets and inlaid book cases; "architectural repairs due to mechanical and electrical work"; retiling the bathrooms; and purchasing interior furniture and furnishings, to mention but some items. Hardship Hearing Record at 180-197. In addition, the Commission heard testimony from another consultant that the Morgan Report is "the kind of estimate that would kill a project stone dead or at least send you back to the drawing board . . . . There are a lot of items in there that you could do without." *Id.* at 672.

This evidence supports the Commission's finding and will not be reweighed by this court. Nor does the court

accept plaintiffs' argument that the Commission erred by even considering whether ICS could continue its existing use of the property. Plaintiffs argue that the Commission's use of the words "traditional use" meant that it did not consider whether ICS has lost "all reasonable and beneficial use" of its property. But the Commission's written findings clearly can be read as concluding that the existing or "traditional" use is an economically viable one. *See* Plaintiffs' Appendix, Exh. 6 at 12 ("The Commission notes that the Applicant has successfully used its Properties in a traditional manner since it acquired them over forty years ago, and finds no logic in the Applicant's contention that the recent landmark designation in any way deters this use from continuing into the future.")

2. The Commission's Finding That Poor Stewardship of the Property by ICS May Be the Only Impediment to Continuance of the Existing Use Was Not Improper.

The Commission made a finding that the owner's neglect of the Blair and Countiss houses may be the only impediment to the continuance of their existing use. Plaintiffs argue that this finding is against the manifest weight of the evidence in that it is an improper consideration that demonstrates the arbitrariness and capriciousness of the Commission's overall conclusions. Plaintiffs argue that the Commission's reference to the "poor stewardship" of ICS shows that the Commission denied the economic hardship exception as a punishment for the neglect of landmark buildings.

This claim may be analyzed by reference to the Commission's rules, which state that in economic hardship cases involving demolition permits, the Commission will consider, among other things, "the testimony of an architect, developer, real-estate consultant, appraiser, or other real-state professional experienced in rehabilitation as to the economic feasibility of rehabilitation or reuse of

the existing structure on the property." Rules and Regulations of the Commission on Chicago Landmarks, Art. V(A)(4)(d). The rules do not further define "economic feasibility" in this context. But assuming *arguendo* the correctness of plaintiffs' assumption that the Commission must take property owners as it finds them, the court again concludes that the Commission did so in this case. The Commission's written decision cited the following evidence of how ICS and its U.S. Section had spent its money in 1988, 1989 and 1990:

Line Time	1988	1989	1990
Salaries	$365,931	$318,019	$350,196
Printing & Publications	151,338	184,694	243,716
Annual Meeting (U.S. Section only)	77,167	151,830	107,781
Repairs & Maintenance	38,722	23,940	40,341

Plaintiffs' Appendix, Exh. 6 at 13; Hardship Hearing Record, Vol. F, Exhs. 602, 603, 702, 703. The following figures show that neglect or poor stewardship by ICS, as reflected in its budget expenditures, is relevant to the "economic feasibility" of rehabilitating the property. The record shows that ICS has spent a relatively small amount of money on repair and maintenance in comparison to its expenditures for other purposes. ICS may wonder whether the Commission ought to be questioning how ICS chooses to spend its money as a private organization. But in doing so, the Commission was doing no more than taking the owner and the property as it finds them, as plaintiff argues the Commission should do. *See* Plaintiffs' Reply at 54. The evidence in the administrative record supports the Commission's conclusion that continued use of the Blair and Countiss houses as offices and a museum is economically feasible, and the Commission did not err in considering ICS's poor stewardship as a part of that calculus.

3. The Commission's Finding That the Properties Could Be Improved by ICS for a Reasonable Amount of Money Was Not Against the Manifest Weight of the Evidence.

The Commission's finding that the Blair and Countiss houses could be improved for a reasonable amount of money obviously is integral to its conclusion that continuing the current use of the property is feasible. The finding is supported by the evidence the court has already discussed in Part III of this opinion. In finding that the Morgan Report's repair estimate was "inflate[d] . . . to prove a point," the Commission relied on the evidence of the scope of repair and renovation work that was set forth in the report. Plaintiffs' Appendix, Exh. 6 at 15. As the court has observed, the record included evidence that many of the suggested repairs are not needed in order for ICS to continue the existing use of the buildings. *See* Hardship Hearing Record at 672. Real-state appraiser Jared B. Shlaes, who inspected the property for one of the interested parties, testified: "I saw no evidence of any serious defects anywhere. There were minor defects about which the board has heard a great deal that are correctable at a reasonable cost." *Id.* at 726. Perhaps most telling was the testimony of Walker C. Johnson, an architect retained by ICS to consider the feasibility of ICS's staying in the buildings as they currently exist. Johnson testified that the Morgan Report cost estimates were "very reasonable." *Id.* at 144. But he also testified that the two buildings were "extremely" sound in structure, and that it would be possible to make the buildings watertight for $480,000.00 and create a maintenance program in which other needed repairs would be made gradually and the costs spread out over a period of years. *Id.* at 162-64. At the same time, the record disclosed no obstacle to financing repair of the buildings through a mortgage, except for the testimony of Lumley of ICS that his organization is simply unwilling to go into debt. *Id.* at 302. The

Commission concluded that the cost of improving the property for continued use was reasonable. On this record, the court cannot say that the opposite conclusion was clearly evident. The Commission's finding therefore was not against the manifest weight of the evidence.

4. Evidence Supports the Commission's Conclusion That Several Feasible Alternative Uses for the Property Were Outlined.

The Commission also found that several feasible alternative uses existed. Specifically, the Commission found that it would be feasible for ICS to sell the Blair House and use the proceeds to consolidate ICS operations into a renovated Countiss House. Plaintiffs' Appendix, Exh. 6 at 15. The Commission found that other feasible alternative uses for either of the buildings would be as consulates or single-family homes. *Id.* at 16-17.

Plaintiffs attack this finding mainly on the basis that each of the suggested alternative uses would force ICS to sell one or both of its buildings. "The forced *sale* of a property cannot possibly be considered a reasonable and feasible alternative *use*," plaintiffs argue. Plaintiffs' Reply at 60. However, plaintiffs' proposed use, which they advance as the only reasonable use, also calls for the sale of the property. Agreed, the proposed redevelopment would allow plaintiffs to stay on the premises, but so would the alternative of selling one of the landmark houses to finance the rehabilitation of the other. In other words, the first of the Commission's suggested alternatives is really no different than the one plaintiffs prefer, except plaintiffs would not reap as much profit as they would like if the buildings were sold as single-family homes for $6.5 million, as a real-estate appraiser Shlaes testified they could be. Hardship Hearing Record at 726-27.

If both buildings were sold as single-family homes or consulates, ICS would have to move elsewhere. But in that vein, the question becomes whether the economic

hardship exception depends on the property owner's ability to have a particular use it wants, as opposed to another use that is still reasonable. The Landmarks Ordinance provides that economic hardship exceptions are granted "on the basis that the denial of permit will result in the loss of all reasonable and beneficial use of or return from the property." Chicago Municipal Code, Ch. 2-120, § 830. It does not state that a "reasonable" or "beneficial" use must be one that is suited to the desires of the particular owner. If the buildings still may be used as single-family homes or a consulate despite the denial of the demolition permits, "all reasonable and beneficial use" of the buildings has not been lost. In any event, this is largely an academic question because the court already has concluded that substantial evidence supports the Commission's finding that ICS's continued use of the property in its current state—as offices and a museum—is reasonble.

A word is in order about the evidence in the record supporting the Commission's finding that the aforementioned alternative uses are indeed feasible. As to the sale of one building and consolidation of the other, the Commission noted that ICS acknowledged it needs a total of about 20,000 square feet of space for its operations, whereas the Countiss House offers at least that much space. Lumley of ICS confirmed these facts on cross-examination. Hardship Hearing Record at 302-03. As to the viability of the properties as single-family homes, the Commission received conflicting testimony. *Id.* at 375, 726. But the Commission's written report demonstrates that it believed the witnesses who testified that single-family use was viable or that a market existed for these two buildings as single-family residences. Plaintiffs' Appendix at 16-17. These witnesses included architect Johnson, who testified for ICS. Hardship Hearing Record at 168. The court will not re-evaluate that credibility judgment. With respect to use as a consulate, the Commission heard evidence that the Countiss House is adjacent to the Polish Consulate at

1530 North Lake Shore Drive, and that ICS rejected a $6.5 million offer in 1986 from the People's Republic of China to buy the Blair and Countiss houses for use as a consulate. *Id.* at 46, 55.[18] Plaintiffs point out that a zoning variance would be required to allow use as a consulate, and they argue that the possibility of obtaining such a variance is purely speculative. Accepting that position for purposes of argument, the court still cannot conclude that the Commission's finding regarding consular use was against the manifest weight of the evidence, given that the Polish Consulate sits right next door to the ICS property.

5. The Commission's Finding That ICS Apparently Ignored or Did Not Fully Explore Potentially Viable Sources of Funds to Allow the Continued Use of the Property Was Not Against the Manifest Weight of the Evidence.

In finding that ICS ignored or did not explore potentially viable sources of funds to allow the continued use of the property, the Commission cited a number of possible sources, including volunteer fund raising, selling one

[18] ICS General Counsel Alvin Edelman gave this testimony. Edelman also testified that the China offer was rejected because the Chinese wanted ICS to "bring the building into full compliance and warrant the condition of the building as being free of any defects of any kind," which was "impossible for us to do." *Id.* at 55, 54. Yet Edelman later testified that in his opinion, the Countiss House—which had been cited for building code violations—was largely in compliance. *Id.* at 72. Viewing the facts in the light most favorable to the agency, the court must conclude that the China offer is substantial evidence of the reasonableness of use of the ICS property as a consulate. Incidentally, the record indicates that the Chinese were serious about their offer. The Chinese, negotiating with Edelman through the law firm of Mayer, Brown & Platt, started with an offer of $5.5 million and then increased the offer to $6.5 million. *Id.* at 54-55. But Edelman testified that ICS at that time would accept no less than $12.7 million. *Id.* at 55.

building and consolidating operations into the other, obtaining private grants, charging a museum admission fee or opening a museum store. Plaintiffs' Appendix, Exh. 6 at 17-19. Plaintiffs argue that all of these options are too speculative to be viable. But as the court concluded above, evidence supported the Commission's finding that using the proceeds of the sale of one of the buildings to finance consolidation into the other would be one viable alternative use. The evidence also supports the finding that ICS has not fully explored this alternative. ICS World President Lumley testified that consolidation would be feasible but unrealistic because it would not accommodate the ICS museum, but at the same time he conceded that "[w]e have got rather luscious accommodations at the moment. We can easily cut down our office space. There are rather large office rooms down there. That could be done." Hardship Hearing Record at 303. The Commission also had a basis in the record to discount Lumley's testimony that consolidation would force the museum out: The Countiss House encompasses more than 20,000 square feet of space, including the coach house but not the basement, and the ICS redevelopment contract with Robin gives ICS the option to retain up to 20,000 square feet of space in the contemplated 41-story high-rise building. *Id.* at 734-35; Plaintiffs' Appendix, Exh. 11 at ¶ 22. Once again the Commission's conclusion regarding consolidation was not against the manifest weight of the evidence.

Moreover, the Commission's written decision also mentioned the possibility of the ICS obtaining the money from its members, citing Lumley's testimony that ICS members are more interested in surgery than in maintaining the buildings. *See* Hardship Hearing Record at 283; Plaintiffs' Appendix, Exh. 6 at 19. This testimony by Lumley and similar testimony by U.S. Section President Rubio, mentioned earlier in this opinion, support the Commission's finding that ICS has been simply unwilling to

explore effective means of funding its continued use of its buildings. The finding is not against the manifest weight of the evidence.

B. The Commission's Conclusion That Plaintiffs Were Not Deprived of All Reasonable and Beneficial Economic Return From the Property Was Not Against the Manifest Weight of the Evidence.

1. Evidence in the Record Supports the Commission's Finding That the ICS Contract With Robin Is a Single But Not Controlling Factor in Determining Whether ICS Was Entitled to an Economic Hardship Exception.

Plaintiffs argue that in finding that the ICS contract with Robin to redevelop the Blair and Countiss houses was not the controlling factor in the ICS application for an economic hardship exception, the Commission "does what any child would do under the circumstances" by denying that the contract is real through the "euphemism" of describing the contract as "not a controlling factor." Plaintiffs' Memorandum at 126. However, as defendants point out, the Commission's rules specifically provide that economic hardship is not established solely by proof of an actual loss or a lost opportunity to gain increased return from the property. Rules and Regulations of the Commission on Chicago Landmarks, Art. V(C). In addition, plaintiffs' argument that the contract is the controlling factor ignores the fact that the contract is void unless the city grants the permits necessary to allow the redevelopment to go forward. Hardship Hearing Record at 37. Therefore the Commission properly considered the property's appraised value as landmark single-family homes, in addition to its value under the ICS contract for a purported $17 million sale to Robin. That appraised value

was $6.5 million, *id.* at 727, and it is substantial evidence supporting the Commission's decision that a reasonable economic return was possible through the sale of the buildings.

The Commission's consideration of the ICS contract as only a single factor also is supported by Shlaes' testimony that in his opinion, the soft market for high-rise condominium units would not support the cost of redeveloping the ICS property as a high-rise. *Id.* at 731, 810. This testimony is significant because although the redevelopment contract provides for a purchase price of $17 million, only about $12.5 million would be paid up front. Plaintiffs' Appendix, Exh. 11 at ¶ 4. The remainder would be secured by the buyers' execution of a nonrecourse promissory note; the buyers would pay off the note by conveying 50 percent of the proceeds from the sale of the condominium units until the balance is paid in full. *Id.* So if the units did not sell, ICS would not receive the full $17 million.

The Commission's consideration of the contract as only one factor was not against the manifest weight of the evidence.

2. The Commission's Finding That the Contract Does Not Establish a Value for the Properties Was Not Against the Manifest Weight of the Evidence.

Plaintiffs argue that because the ICS contract with Robin was "in full force and effect" and was "valid and enforceable," the Commission erred when it found that the contract itself does not establish a value for the properties. As explained above, the contract's value of $17 million was contingent on successful sale of the condominium units. The Commission relied on that fact in making its finding. Plaintiffs' Appendix, Exh. 6 at 22. The Commission also observed that the contract is not

an appraisal, and that ICS did not submit its own appraisal as to the value of the Blair and Countiss houses. *Id.* at 21-22. The only real appraisal before the Commission was the $6.5 million appraisal prepared for the interested parties by Shlaes, as the Commission noted, adding that the appraisal's reasonableness was supported by the uncontroverted evidence that the Chinese government offered the same amount for the property in 1986. *Id.* at 22-23. In light of the Shlaes appraisal and Shlaes' testimony that the Robin contract was highly speculative under current market conditions, plaintiffs have not established that the Commission went against the manifest weight of the evidence when it found that the contract did not establish the value of the property.

3. The Commission Did Not Err in Concluding That It Was Required to Determine Whether The Permit Denials Caused a Loss of All Reasonable Return, as Opposed to the Highest and Best Return.

The Commission's written findings included the conclusion that it need only determine whether ICS was deprived of all reasonable return, as opposed to the highest and best return. The Commission supported this conclusion with a discussion of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The Commission stated:

> *Penn Central* seems to set a permissibly high standard in determining whether a landmark designation constitutes a governmental "taking" of property. The Applicant would have the Commission believe that a "taking" occurs whenever a designation prevents a landowner from developing a property to its "highest and best use." This proposition is inconsistent with the Commission's understanding of the letter and spirit of *Penn Central* and subsequent court decisions. In the context of a landmark designation,

> denying an applicant the highest and best use of a property is not a denial of all reasonable and beneficial use or return. In fact, according to *Penn Central*, a designation that does not prevent the applicant from the continued use [of] the property does not amount to either a taking or an economic hardship.

Plaintiffs' Appendix, Exh. 6 at 24.

Although review of agency findings of fact is deferential, the court independently reviews the correctness of agency conclusions of law. *Board of Educ. of Schaumburg Community Consol. School Dist. 54 v. Illinois Educ. Labor Relations Bd.*, 247 Ill. App.3d 439, 616 N.E.2d 1281, 1291 (1st Dist.), *appeal denied*, 152 Ill.2d 554, 622 N.E.2d 1200 (1993). In *Penn Central*, the United States Supreme Court held that New York City's landmarks ordinance did not effect a "taking" of a landmark owner's property because the restrictions promoted the public interest in preserving historic buildings while permitting "reasonable beneficial use of the landmark site" and a "reasonable return on [the owner's] investment." *Penn Central*, 438 U.S. at 136, 138 (internal quotation marks omitted).

Plaintiff argues that the Commission wrongly applied *Penn Central* to this case because the Blair and Countiss houses "cannot continue to be used without the expenditure of substantial amounts of money," which ICS does not have. Plaintiffs' Memorandum at 130. But as the court has pointed out several times in this opinion, there is evidence in the record that the shortage of funds for the maintenance or rehabilitation of the building is not a result of landmark designation, but instead is a matter of conscious choice by ICS as to how to allocate its financial resources. The court's January 1992 opinion saw no meaningful distinction between *Penn Central* and this case, and nor does such a distinction exist today. The Commission did not err in relying on the rationale of

Penn Central in reaching the result it did. Even if the Commission's rules do not call for economic hardship exceptions to be considered in terms of the legal issues that arise in a takings context, there is nothing to prevent the Commission from drawing upon the common law of takings as a part of its thoughtful consideration of whether the landmark designation and permit review process is treating the landowner with fundamental fairness.

The Commission did not commit any error of law when it relied on *Penn Central* to conclude that it need only determine whether the permit denial deprived plaintiffs of all reasonable return, as opposed to the highest and best return.

4. The Commission's Finding That Other Alternatives Were Demonstrated for the Reasonable Economic Return on the ICS Property Was Not Against the Manifest Weight of the Evidence.

This finding by the Commission regarding alternative means of a reasonable economic return on the ICS property is largely cumulative of the agency's finding that several reasonable and feasible alternatives had been shown for the use of the property. The Commission stated that a sale of either of the buildings for the amounts estimated in the Shlaes appraisal ($3.1 million for the Blair House and $3.4 million for the Countiss House) "would represent a reasonable return" in ICS's initial investment. Plaintiffs' Appendix, Exh. 6 at 25. Noting that the record showed the Commission bought the Blair House for $85,000.00 in 1947 and the Countiss House for $185,000.00 in 1950, the Commission accepted Shlaes' testimony that if the property were sold, the Blair House would fetch at least an 8.52 percent compound annual net return, and that the Countiss House would earn at least a 7.36 percent return. *Id.* at 25-26. These calculations of economic return did not account for the fact that ICS had occupied the buildings for more than 40 years without paying rent, and that the buildings had rental value, according to Shlaes. *Id.*

The Commission's decision simply quoted Shlaes' testimony, and plaintiffs do not dispute such that testimony was in the record. Rather, the plaintiffs ask this court to reweigh that testimony against statements by ICS witnesses to the effect that without the redevelopment, the property cannot be sold for more than $700,000.00, yielding an unreasonable return. Again, the court cannot reweigh the evidence or re-evaluate the credibility of the witnesses. The agency's conclusion based on Shlaes' testimony was not against the manifest weight of the evidence and will not be disturbed.

The Commission's finding also included a discussion of the possible sale or lease of one building and consolidation of ICS operations into the other. But this discussion, along with the Commission's extrapolation of the $6.5 million offer from the Chinese government by use of the Consumer Price Index, do not significantly add to the Commission's conclusion that ICS could gain a reasonable return through the sale of the buildings at the appraised value. Therefore these aspects of the Commission findings do not require further discussion.

5. The Record Included Evidence to Support the Commission's Finding That ICS Knew of the Commission's Consideration and the Eventual Adoption of the Designation Ordinance.

The Commission found that when ICS negotiated the redevelopment contract with Robin, it did so with full knowledge of the possibility that the property would be designated as a landmark. This finding is not against the manifest weight of the evidence. Plaintiffs argue that the

finding is arbitrary because it ignores how ICS had planned to redevelop its property in some manner as early as 1966, well before the city began considering landmark designation in June 1988. Plaintiffs' Memorandum at 133-34. But evidence in the record showed that plaintiffs' earlier redevelopment plans (those other than the current proposal) failed not because of any action by the city, but because the financial details did not fall into place.[14] Hardship Hearing Record at 74. So there is no evidence to support plaintiffs' suggestion that landmark designation in any way thwarted plaintiffs' earlier expectations.

As to their current expectations, this court already has concluded that plaintiffs received adequate notice of the designation proceedings on June 1, 1988. Plaintiffs have stated that contract negotiations actually began several months earlier, in January 1988, but the contract was signed in February 1989 (four months before the City Council formally designated the property as landmarks) and ratified by ICS's governing board in October 1989 (four months after designation). *See id.* at 32-34. But plaintiffs do not seriously argue that they conducted the contract negotiations without knowledge of the possibility of landmark designation and the regulations that would go along with it. They could not make that argument,

[14] Specifically, a development plan involving architect Karl Metz fell apart in 1968 because ICS balked at lending institutions' demands for an equity partnership in the project as a premium for their making the loans. *Id.* at 39-43. In 1972, the National Restaurant Association offered to sell its property at 1530 North Lake Shore Drive, immediately north of the Countiss House, to ICS for $770,000.00 "based upon a plan to develop all three buildings," but ICS lacked the funds for the purchase, and the 1530 building was sold to the government of Poland for use as a consulate. *Id.* at 43-46. ICS later received a $4.5 million offer from Jupiter Corporation in 1980 to redevelop the ICS property into a 40-story condominium tower, but Jupiter backed out, citing high interest rates. *Id.* at 46. ICS rejected subsequent offers from the Hawthorne Development Group in 1980, the 1516 Associates Partnership in 1982, and the Chinese government in 1986. *Id.* at 48-51, 53-55.

since the contract language itself anticipates legal costs to oppose landmark status. Plaintiffs' Appendix, Exh. 11 at ¶ 16. This contractual language is perhaps the clearest evidence in support of the Commission's finding that insofar as ICS was claiming an economic hardship related to landmark designation, ICS could not claim that its attempts to redevelop its property were blindsided by the designation.

CONCLUSION

For the foregoing reasons, the court will enter summary judgment in favor of defendants and against plaintiffs on plaintiffs' claims for alleged violations of state and federal equal protection and due process; of state constitutional prohibitions against special legislation, unlawful delegation, vagueness and the uncompensated taking or damaging of property; and of any vested rights under state law. The court will also affirm the Commission's decisions denying plaintiffs' applications for demolition permits and an economic hardship exception.

DATED: December 30, 1994

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

December 30, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 1587

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

No. 91 C 5564

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

JUDGMENT ORDER

Final judgment is hereby entered on the plaintiffs' First Amended Consolidated Complaint for Administrative Review, as follows:

1. Summary judgment is entered in favor of the defendants and against the plaintiffs on the plaintiffs' claims for alleged violations of federal and state equal protection and due process; of state constitutional prohibitions

against unlawful delegation, special legislation, vagueness and the uncompensated taking or damaging of property; and of any vested rights under state law.

2. Judgment is entered in favor of defendants and against plaintiffs, affirming the decisions of the Commission on Chicago Landmarks denying plaintiffs' applications for demolition permits and an economic hardship exception regarding the property at 1516 and 1524 North Lake Shore Drive.

DATED: December 30, 1994

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

APPENDIX C

December 30, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 7849

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

ORDER

On March 30, 1993, this court stayed this action pending the resolution of the proceedings in 91 C 1587 and 91 C 5564, related matters that have been consolidated ("the consolidated action"). The consolidated action concerns a complaint for administrative review of decisions by the Commission on Chicago Landmarks, under the authority vested in it by the Chicago Landmarks Ordinance, with respect to plaintiffs' plans to develop their property. This action seeks administrative review of the Chicago Plan Commission's denial of plaintiffs' application for approval of the same proposed development under the Chicago and Lake Michigan Lakefront Protection Ordinance.

In moving to stay this action, plaintiffs conceded that if this court, in the consolidated action, should decide that the Landmarks Commission's actions were lawful, plaintiffs would be unable to proceed with their proposed development regardless of whether the Chicago Plan Commission acted properly in its application of the Lakefront Protection Ordinance. Plaintiffs' Motion to Stay at ¶ 4. Plaintiffs added that if they did not prevail in the consolidated action, and if this court's unfavorable decision in that action is affirmed on appeal, plaintiffs would voluntarily dismiss this action. *Id.*

On this date the court is entering judgment for defendants in the consolidated action, for the reasons stated in the court's memorandum opinion. With plaintiffs having conceded that an unfavorable decision in the consolidated action renders this action moot, the court hereby dismisses this action with prejudice but with leave to reinstate in the event the court's decision in the consolidated action is vacated, reversed or remanded on appeal.

DATED: December 30, 1994

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

APPENDIX D

August 27, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 1587

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs International College of Surgeons and Robin Construction Corporation filed a complaint for administrative review of an adverse decision of the Chicago Landmarks Commission in the Circuit Court of Cook County. Defendant City of Chicago ("the City") removed the case to this court pursuant to 28 U.S.C. § 1441(b). Plaintiffs now seek to remand the case on the grounds removal was improper and the removal petition was procedurally defective. For the reasons stated below, plaintiffs' motion to remand is denied.

Plaintiffs' complaint raises several federal constitutional issues over which this court has original jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiffs allege that the landmark ordinance, both on its face and as applied, violates the due process and equal protection clauses of the Fourteenth Amendment and constitutes an unlawful taking in

violation of the Fifth and Fourteenth Amendments. Plaintiffs' Complaint for Administrative Review ("Plaintiffs' Complaint"), ¶¶ 16(a), 16(d), 16(e)-(h), 16(j), 16(k), 16(n). Moreover, plaintiffs seek a declaration that the landmark ordinance is unconstitutional on its face and as applied and a declaration that the Landmarks Commission violated plaintiffs' right to due process and equal protection by denying their application for a demolition permit. Plaintiffs' Complaint at 23, ¶¶ 2-5. Where the court has original jurisdiction "founded on a claim or right arising under the Constitution . . . of the United States," the action is removable pursuant to 28 U.S.C. § 1441(b).[1]

In their reply memorandum, plaintiffs raise for the first time the possibility of a procedural defect in the removal petition. Plaintiffs observe, almost in passing, that defendant 1500 Lake Shore Drive Building Corporation ("1500 Lake Shore") had not communicated its consent to removal within thirty days of its receipt of the initial pleading containing the removable claim, as required by 28 U.S.C. § 1446(b). Plaintiffs state merely that 1500 Lake Shore "had yet to indicate to this Court [its] position with respect [to removal]," and cryptically note that "it is not entirely clear whether such inaction . . . presents a problem in this instance." Plaintiffs' Reply Memorandum in Support of Their Motion to Remand ("Plaintiffs' Reply"), at 2, note 1. Defendant 1500 Lake Shore then filed a surreply in which it vigorously denies plaintiffs' assertions that it failed to consent to removal, and plaintiffs in turn have filed a reply to 1500 Lake Shore's surreply, in which they discuss the alleged procedural defect in greater depth.

---

[1] Plaintiffs alternatively contend that the court should decline to exercise its jurisdiction in this case pursuant to various abstention doctrines. However, the issue of whether removal was proper is distinct from the issue of whether abstention would be appropriate. The court declines to address the merits of abstention at this early juncture.

Plaintiffs' complaint for administrative review was filed in state court on February 13, 1991. The notice of removal filed by the City on March 15, 1991, explicitly states: "The other defendants in this proceeding, 1500 Lake Shore Drive Building Corporation and the North State, Astor, Lake Shore Drive Association have consented to the removal of this suit to federal court." Notice of Removal, ¶ 4. On the same day, 1500 Lake Shore filed its appearance in federal court.

Nonetheless, in their reply to 1500 Lake Shore's surreply, plaintiffs allege that the removal petition is defective because all defendants did not sign the removal notice "or otherwise formally express their unanimous consent to the court within the thirty-day period." The court disagrees. The case law does not require that each defendant sign the removal notice, *see Fellhauer v. City of Geneva*, 673 F. Supp. 1445, 1447 (N.D. Ill. 1987), and paragraph 4 of the notice of removal, which names the additional defendants and states that all have consented to removal, is sufficient to convey the defendants' unanimous consent.[2]

CONCLUSION

Plaintiffs' motion to remand is denied.

DATED: August 27, 1991

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

[2] Indeed, plaintiffs themselves previously acknowledged that "[o]n March 15, 1991, all of the other defendants joined in a Notice of Removal removing this civil case from the Circuit Court of Cook County." Plaintiff's Memorandum in Support of Motion to Remand at 2. Plaintiffs' earlier admission might estop them to contest the issue of unanimous consent. *See Fellhauer*, 673 F. Supp. at 1447 ("The thirty-day requirement is not a jurisdictional limitation, and therefore a plaintiff may waive or be estopped from asserting this objection.").

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 4, 1996

Before HON. WILLIAM J. BAUER, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. WALTER JAY SKINNER, District Judge*

Nos. 95-1293 and 95-1315

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, Illinois, a municipal corporation, CHICAGO PLAN COMMISSION, and its Commissioners, REUBEN L. HEDLUND, *et al.*,
Defendants-Appellees.

* The Honorable Walter Jay Skinner of the United States District Court for the District of Massachusetts is sitting by designation.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern District
No. 91 C 1587, No. 91 C 5564, No. 91 C 7849,
John F. Grady, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc initially filed on September 5, 1996 and the petition with corrected appendix refiled on September 19, 1996, by defendants-appellees, no judge** in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby DENIED.

** The Honorable Joel M. Flaum did not participate in the consideration of this case.

No. 96-910 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*Counsel of Record

QUESTION PRESENTED

Does a federal district court, as a court of original jurisdiction, have jurisdiction to conduct appellate-like review of local administrative agency decisions, when state-court complaints for administrative review also contain federal constitutional allegations?

LIST OF PARTIES

Petitioners properly identify the parties to this proceeding. Pet. ii. This brief in opposition is filed on behalf of the International College of Surgeons, the United States Section of the International College of Surgeons, and Robin Construction Corporation.

RULE 29.6 LISTING

The International College of Surgeons is a not-for-profit corporation of the District of Columbia. It has no parent or subsidiaries. The United States Section of the International College of Surgeons is a not-for-profit corporation of the District of Columbia. It has no parent or subsidiaries.

Robin Construction Corporation is an Illinois corporation. It has no parent or non-wholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-910

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the International College of Surgeons, the United States Section of the International College of Surgeons, and Robin Construction Corporation (hereinafter the "College"), request that this Court deny the petition for a writ of certiorari filed by the City of Chicago, its Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Freidman, Seymour Persky, Larry Parkman, Joseph F. Boyle, Jr., and Cherryl Thomas (hereinafter collectively, the "City"), which seeks review of a decision of the United States Court of Appeals for the Seventh Circuit. That opinion is reported at 91 F.3d 981 (7th Cir. 1996).

STATEMENT

In this case, the College has challenged the landmark designation of two buildings on North Lake Shore Drive in Chicago. Pet. App. 2a. The City's instant Petition arose out of two Illinois administrative review appeals from two decisions of the Commission on Chicago Landmarks (the "Commission"), acting under the Chicago Landmarks Ordinance (the "Landmarks Ordinance"). Pet. App. 3a.

Following an administrative hearing, the Commission denied the College's request for demolition permits required to redevelop its landmarked property. The College then sought an economic hardship exception under the Landmarks Ordinance, and again the Commission denied that request after a second hearing. Thereafter, the College, pursuant to the Illinois Administrative Review Act ("IARA"), 735 ILCS 5/3-103, filed two separate "Complaints for Administrative Review" in the Circuit Court of Cook County. Pet. App. 3a-4a, 6a. The City removed the complaints to the federal district court. *Id.*[1] The district court dismissed certain of the College's claims and thereafter entered summary judgment against the College on the remaining claims and affirmed the Commission's decisions denying the College's applications for demolition permits and the economic hardship exception. Pet. App. 4a-5a. On appeal, the Court of Appeals for the Seventh Circuit reversed the judgment of the district court and remanded the case to the Circuit Court of Cook County. Pet. App. 23a. After concluding that an action such as the College's for judicial review under the IARA is essentially an appellate proceeding in which an Illinois court employs a deferential standard of review, Pet. App. 19a, the court held that the College's complaints for administrative review were not "civil action[s] . . . of which the district courts . . . have original jurisdiction" within the meaning of 28 U.S.C. § 1441, and, accordingly, removal was barred. Pet. App. 23a.

[1] The College's motion to remand was denied, Pet. App. 94a-95a, and the district court then consolidated the merits of the issues raised. Pet. App. 4a.

On September 19, 1996, the City filed its Petition for Rehearing with Suggestion for Rehearing En Banc. The panel and the full court denied that petition on November 4, 1996. Pet. App. 97a-98a. The City subsequently moved to stay the issuance of the Seventh Circuit's mandate. Its motion was denied on November 22, 1996. App., *infra*, 1a-3a.

REASONS FOR DENYING THE PETITION

The City's petition for a writ of certiorari is merely a rehash of arguments now thrice-rejected by the Seventh Circuit, first on the decision on the merits, next on the City's petition for rehearing and suggestion for rehearing en banc, and finally on the City's recent motion to stay the Seventh Circuit's mandate. Pet. App. 97a-98a; App. 1a-3a. The City's position in its petition is directly contrary to 1995 decisions of both the First and the Fourth Circuits, as well as this Court's reasoning in *Chicago, Rock Island & Pacific Railroad v. Stude*, 346 U.S. 574 (1954) and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). Concocting a purported conflict in the circuits in an attempt to meet the mandate of Rule 10(a) of this Court, the City relies only on a dated and poorly-reasoned decision by the Eighth Circuit, *Range Oil Supply Co. v. Chicago, Rock Island & Pacific Railroad*, 248 F.2d 477 (8th Cir. 1957), a case contrary to this Court's decision in *Stude* and explicitly rejected as "meaningless" by the panel below, as well as by the Fourth Circuit in *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995). The City also effectively ignores numerous cases that hold that district courts are without jurisdiction to review on appeal the findings of state agencies, and, given this well-settled law, offers no valid basis as to how this case could properly be removed to federal court or why this case merits further review by this Court. The City's various policy and other tangential arguments, as set forth below, are equally unconvincing.

I. NO SIGNIFICANT CONFLICT EXISTS AMONG THE CIRCUITS OVER WHETHER FEDERAL DISTRICT COURTS HAVE JURISDICTION TO CONDUCT APPELLATE REVIEW OF STATE AGENCY DECISIONS

The Seventh Circuit's decision in this case is solidly grounded on this Court's decisions in *Chicago, Rock Island & Pacific Railroad v. Stude*, 346 U.S. 574 (1954), and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). *See* Pet. App. 7a-11a. Indeed, as the Seventh Circuit recognized, this Court stated in *Stude* and implied in *Horton* that federal district courts, as courts of original jurisdiction, cannot review on appeal findings of state agencies. *See Stude*, 346 U.S. at 581 ("The United States District Court . . . does not sit to review on appeal action taken administratively or judicially in a state proceeding. A state 'legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal. . . .'") (quoting *Burford v. Sun Oil*, 319 U.S. 315, 317 (1943)); *Horton*, 367 U.S. at 354-55 (concluding that a federal district court had jurisdiction over a suit to set aside an administrative award only after concluding that suit was not an appellate proceeding).

Prior to the Seventh Circuit's decision in this case, both the Fourth Circuit and the First Circuit Courts of Appeals had held that an action seeking review of a state administrative agency's decision is not removable where state law provides for deferential review in state court of such decision. *See Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155, 158 (4th Cir. 1995); *Armistead v. C & M Transport, Inc.*, 49 F.3d 43, 47-48 & n.4 (1st Cir. 1995).

The Seventh Circuit's opinion also emphasizes that numerous other courts, including the First, Second, Fourth, Fifth, Ninth and Tenth Circuits, have concluded, in various procedural contexts, that district courts are without jurisdiction to review on appeal the findings of state agencies. *See* Pet. App. 15a n.10; *see, e.g., Labiche v. Louisiana Patients' Compensation Fund Oversight Bd.*, 69 F.3d 21, 22 (5th Cir. 1995) (per curiam) ("We

have reviewed [the statutes fixing the jurisdiction of the federal courts] and none would authorize appellate review by a United States District Court of any actions taken by a state agency."); *Armistead*, 49 F.3d at 47-48 & n.4 ("As courts of *original* jurisdiction, federal district courts sitting in diversity do not have appellate power. . . ."); *W.M. Schlosser*, 64 F.3d at 157-58 (collecting cases); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 11 (2d Cir. 1992) ("This Court lacks jurisdiction to hear [appellant's] claim that the [state agency's] substantive decision was arbitrary and capricious."); *Shell Oil Co. v. Train*, 585 F.2d 409, 414-15 (9th Cir. 1978) (holding that federal district court was without jurisdiction to review state agency denial of environmental permit); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 42 (1st Cir. 1972) ("To the extent that the federal district court would treat a case removed from the [state court] as a review of a[] [state] administrative decision by giving deference to the [agency's] determination . . . , this would place a federal court in an improper posture vis-a-vis a non-federal agency."); *Trapp v. Goetz*, 373 F.2d 380, 383 (10th Cir. 1966) ("[T]he United States District Court had no power to consider an appeal from the state administrative tribunal. Such a proceeding is not within its statutory jurisdiction."); *cf. Frison v. Franklin County Bd. of Educ.*, 596 F.2d 1192, 1194 (4th Cir. 1979) ("[T]he [district] court should have declined pendent jurisdiction over this state law claim because it is essentially a petition for judicial review of state administrative action rather than a distinct claim for relief.").

Faced with this overwhelming authority, the City's petition relies almost wholly on *Range Oil Supply Co. v. Chicago, Rock Island & Pacific Railroad*, 248 F.2d 477 (8th Cir. 1957). *See* Pet. 9-10. The Seventh Circuit's opinion in this case makes clear that it was fully cognizant of the 40-year-old *Range Oil* decision, but chose, as did the Fourth Circuit in *W.M. Schlosser*, not to follow its faulty reasoning. *See* Pet. App. 15a-16a n.10; *W.M. Schlosser*, 64 F.3d at 158. Indeed, contrary to the City's assertions, *Range Oil* is an anomaly. In fact, as emphasized in *W.M. Schlosser*, *Range Oil* failed to follow this Court's decisions in

Stude and *Horton*. *W.M. Schlosser*, 64 F.3d at 158. In the 40 years since it was decided, this Court has never seen the need to revisit *Range Oil*. No compelling need exists here.

Indeed, the Seventh Circuit properly recognized that *Range Oil* is a mere blip on the screen — the courts of appeals, with the sole exception of *Range Oil*, have consistently held that federal district courts are without jurisdiction to review on appeal findings of state agencies. *See* Pet. App. 15a-16a n.10. The Seventh Circuit emphasized that the court in *Range Oil* failed to consider that the diversity statute vests only "original" and not "appellate" jurisdiction in the district courts. *See id.*; *see also Stude*, 346 U.S. at 581; *Burford*, 319 U.S. at 317; *W.M. Schlosser*, 64 F.3d at 158. The Seventh Circuit correctly concluded: "The *Range Oil* court equates 'original jurisdiction' with the prerequisites of diversity jurisdiction, rendering the former requirement meaningless." *See* Pet. App. 15a-16a n.10.[2]

The City's petition offers no meaningful response to this rejection of *Range Oil*. In light of the recent and abundant authority similarly rejecting *Range Oil*, this Court need not consider the purported circuit split identified by the City. Lower federal courts need no further clarification on this issue given the clear and resounding renunciation of *Range Oil*.

Equally unconvincing is the City's attempt to extend the Seventh Circuit's opinion to federal court review of federal agency action under the federal Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Pet. at 8-10. While it is settled that 28 U.S.C. § 1331 confers jurisdiction on federal district courts to review federal agency action under the APA, *Califano*

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[2] Moreover, in contrast to the treatise-like examination of pertinent authorities by the Seventh Circuit herein, Pet. App. 7a-16a, and the Fourth Circuit in *W.M. Schlosser*, 64 F.3d at 156-158, with respect to the removability of state administrative appeals, the Eighth Circuit in *Range Oil* cited no authority on the issue other than the language of 28 U.S.C. § 1441.

v. Sanders, 430 U.S. 99, 105 (1977), it is equally well-settled that Section 1331 does not confer such jurisdiction on the district court to review state administrative actions. *See Trapp*, 373 F.2d at 383 ("An appeal from a state administrative board is not a 'civil action' as required by 28 U.S.C.A. § 1331 or § 1332."). Clearly, the Seventh Circuit's opinion — as well as those in *W.M. Schlosser*, *Armistead*, and the legion of other cases holding that the district courts do not have jurisdiction to review on appeal the findings of state agencies, *see* Pet. App. 15a n.10 — was limited to appeals from *state* administrative review proceedings.

Contrary to the City's argument, then, the Seventh Circuit's opinion does not at all implicate *Califano*, standards of review under the APA, or the long line of authority providing parties aggrieved by federal agency action a right to redress in the federal district court, in the absence of a statute to the contrary.[3] *See* Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, § 18.2 (3d ed. 1994). Moreover, when a federal district court reviews the action of a federal agency under the APA, there is no concern that the federal system — through removal — is intruding into the state's system of administrative review. *See* 1A James W. Moore et al., MOORE'S FEDERAL PRACTICE ¶ 157[4.-3] & nn.6-7 ("A statutory proceeding in state court to

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[3] The City intimates that because federal reviewing courts give "deference" to federal agency decisions, the district courts should be free to serve the same quasi-appellate functions vis-a-vis state agencies. Pet. 12-13. This argument is without merit. It is true that Congress, in enacting the scope of review provision of the APA, has specifically allowed that federal district courts shall give certain levels of deference to federal agency decisions. 5 U.S.C. § 706. Thus, a party aggrieved by federal agency action may invoke so-called "non-statutory review" by looking to the general grants of original jurisdiction that apply to the federal courts. A claim for injunctive or declaratory relief in federal district court against a federal agency or officer clearly falls within 28 U.S.C. § 1331. The APA then informs the reviewing court as to the proper standard of review. Obviously, the scope of review provision of the APA does not contemplate district court review of state agency decisions.

review an administrative proceeding is a civil action, *unless the review proceeding is such an integral part of the administrative review process as to constitute a continuation of the administrative proceeding*.") (emphasis added). The Seventh Circuit's opinion makes clear that it was well aware of such concerns. *See* Pet. App. 13a n.9 (collecting cases and other authorities).

II. THE SEVENTH CIRCUIT CORRECTLY HELD THAT THE COLLEGE'S STATE COURT COMPLAINTS FOR ADMINISTRATIVE REVIEW WERE IMPROPERLY REMOVED

Because the College's complaints required a reviewing court to exercise appellate review of the Landmarks Commission's actions under the Illinois Administrative Review Act, 735 ILCS 5/3-103, the cases removed to the district court were held not to be "civil action[s] . . . of which the district courts . . . have original jurisdiction" within the meaning of section 1441(a). Pet. App. 22a. In so holding, the Seventh Circuit was guided by its recent decision in *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 115 S. Ct. 204 (1994), a case in which "certain aspects of a state proceeding, if segregated from the remainder of that proceeding, could be characterized as a civil action within the original jurisdiction of the district court while other aspects of the same proceeding could not be so characterized." Pet. App. at 20a. There, the court refused to allow removal of a state-court complaint containing claims barred by the Eleventh Amendment and the doctrine of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), along with claims that were removable under 28 U.S.C. § 1441(a). The court in *Frances J.*, examining the plain language of section 1441(a), interpreted that section as "only authoriz[ing] the removal of *actions* that are within the original jurisdiction of the federal courts." *Frances J.*, 19 F.3d at 340. Accordingly, the court in *Frances J.* held that such a case cannot be removed, stating "if even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, *or does not fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal court*, then as a

consequence of § 1441(a), the whole action cannot be removed to federal court." *Id.* at 341 (emphasis added).

The Seventh Circuit in the instant case did not allow the City to use the presence of the College's tangential constitutional challenges to the Landmarks Ordinance to override the well-settled rule that a state administrative review case, as an appellate proceeding, cannot be brought into federal court. Again relying on *Frances J.*, the panel held that section 1441(c),[4] which permits removal of otherwise non-removable claims when joined with claims within federal-question jurisdiction, did not provide an alternate basis for removal, since that section likewise "presuppose[s] the existence of a 'civil action.'" Pet. App. 22a. Thus, because the district court could not exercise original jurisdiction over "all issues therein," removal could not be supported by section 1441(c). *Id.*; *see Frances J.*, 19 F.3d at 340 n.4.

The City's argument in Part Two of its petition — that jurisdiction in this case could be premised on 28 U.S.C. § 1331, or, in turn, 28 U.S.C. § 1367 — likewise fails to raise an issue upon which this Court should grant the City's petition. *See* Pet. 14-19. As the Seventh Circuit determined, these sections, as well as section 1441, clearly contemplate the assumption of the responsibilities of a court of *original* jurisdiction by the district court. Pet. App. 22a. The presence of federal constitutional challenges to the Landmarks Ordinance in the College's administrative review complaints cannot cure the jurisdictional bar to

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[4] In *Frances J.*, the court also took into account the possible applicability of section 1441(c) as an alternate basis for removal in that case. *Frances J.*, 19 F.3d at 340 n.4. The court held that, under section 1441(c) as well as section 1441(a), the plain language of the statute created an insuperable barrier to removal. The *Frances J.* court noted that under the language of section 1441(c), "the entire case may be removed and the district court may determine *all* issues therein." *Id.* Because the Eleventh Amendment and the *Hans* doctrine barred some of the claims from *any* adjudication in federal court, reasoned the court in *Frances J.*, the district court could not determine "all issues therein." *Id.*

district court review on appeal of the actions of a state or local administrative commission. Thus, it is not true, as the City argues, that the College's claims fit within the original or supplemental jurisdiction of the federal court under sections 1331 and 1367. Indeed, under the City's approach, the district court would function as both a court of original federal jurisdiction as well as a state quasi-appellate panel. *See* Pet. App. 22a-23a n.14. This is contrary to the teaching of *Stude*, *Horton*, and their progeny.

III. THIS CASE DOES NOT PRESENT AN OPPORTUNITY FOR THIS COURT TO REVISIT *FRANCES J.* AND OTHER CASES ADDRESSING THE PROPRIETY OF REMOVAL OF STATE COMPLAINTS CONTAINING CLAIMS BARRED BY THE ELEVENTH AMENDMENT

The City states that this case presents this Court with the opportunity to revisit *Frances J.* and a split among circuits over the propriety of removal of a state court complaint containing certain claims barred by the Eleventh Amendment. Pet. 18. The issue is not at all cleanly presented here. Indeed, this case did not involve *any* claims barred by the Eleventh Amendment; only the logic and methodology of *Frances J.* applied to this case. *See* Pet. App. 20a-21a. As such, the decision below does not at all implicate the holding of *Frances J.* In fact, the City's Petition is internally inconsistent — at one point the City claims that this case presents an opportunity for plenary review of *Frances J.* (Pet. 18), while at another the City states that "the applicable statutory framework here also distinguishes this case from *Francis J.* [sic] *v. Wright*, upon which the court of appeals heavily relied" (Pet. 17). Thus, contrary to the City's assertion, and by its own admission, this case is not the proper vehicle for review of *Frances J.*, even if such review is warranted or desired by this Court.

Lastly, the City advances the policy argument that the Seventh Circuit's holding divests federal courts of jurisdiction in certain circumstances. *See* Pet. 19-20. This very argument was

rejected by the Fourth Circuit in *W.M. Schlosser* on the basis of *Stude*, was dismissed by the Seventh Circuit below as "vague" (*see* App. 2a), and should similarly be rejected here. *See W.M. Schlosser*, 64 F.3d at 158-59. The opinion below does not "radically circumscribe" (Pet. 19) federal jurisdiction in any way. It was merely a fact-bound application of well-settled law.

The Seventh Circuit properly reversed the district court's opinion and remanded the College's administrative review complaints to the Circuit Court of Cook County. The opinion was correct on the merits and should not be subjected to further review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 22, 1996

Before

Hon. KENNETH F. RIPPLE, Circuit Judge

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellants,	
Nos. 95-1293 and 95-1315 v.	John F. Grady, *Judge*.
CITY OF CHICAGO, Illinois, a municipal corporation, CHICAGO PLAN COMMISSION, and its Commissioners, REUBEN L. HEDLUND, et al.,	
Defendants-Appellees.	

ORDER

This matter is before me on the motion for the appellees for a stay of the issuance of this court's mandate. *See* Fed. R. App. P. 41(b). A response has been received from the appellants.

The underlying facts of this case are set forth in plenary fashion in this court's opinion. *See International College of Surgeons v. City of Chicago*, 91 F.3d 981 (7th Cir. 1996). The court subsequently denied a petition for a rehearing and no judge in active service requested a vote on the suggestion for rehearing en banc.

As the parties note, the standards that govern a decision on a motion for stay of mandate pending petition for a writ of certiorari are well-established. *See Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (per curiam); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers). As the appellees note in their motion, these criteria essentially require that the moving party establish that it will experience irreparable injury and that it has a reasonable probability of succeeding on the merits before the Supreme Court of the United States.

The appellees have not carried their burden with respect to either of these criteria. It is not at all clear that they will be damaged, much less irreparably, by whatever proceedings take place in this case while their petition for certiorari is pending in the Supreme Court of the United States. Their suggestion that the issuance of the mandate will affect other cases is far too vague to support the relief requested here.

Nor have the appellees made a convincing case that there is a probability that four Justices of the Supreme Court will vote to grant certiorari or that, if certiorari were granted, five Justices would vote to reverse the judgment of this court. As the appellants point out in their response, the principal holding of this court is compatible with the weight of authority. *See International College of Surgeons*, 91 F.3d at 990 n.10.

The appellees also suggest that the Supreme Court will also review our reliance on *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 115 S. Ct. 204 (1994). When the Supreme Court denied certiorari in *Frances J.*, it was aware that not all circuits took the same approach. Judge Flaum had addressed the matter squarely in *Frances J.*, 19 F.3d at 341. Moreover, *Frances J.* does not stand alone on the legal landscape. Finally, the opinion

of this court quite adequately sets forth why the logic and methodology of *Frances J.* prohibit removal in this case. *See International College of Surgeons*, 91 F.3d at 993-94.

Because the appellees have failed to carry their burden of establishing that they will suffer irreparable injury or that they have the requisite probability of success on the merits in the Supreme Court, the motion for stay must be denied.

MOTION FOR STAY DENIED

(3)

No. 96-910

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONERS

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IN THE
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No. 96-910

CITY OF CHICAGO, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

Respondents make no effort to defend the primary ground for the Seventh Circuit's decision in this case—which was that the phrase "civil action" found in both the federal-question and removal statutes (see 28 U.S.C. §§ 1331 & 1441) does not reach an action in which the findings of a state or local administrative agency are reviewed deferentially. Instead, respondents rely primarily on the phrase "original jurisdiction" found in those statutes, and contend that it precludes any form of deferential or "quasi-appellate" review (*e.g.*, Br. 4, 9-10). Of course, respondents do not press this point too strongly, since they concede that federal district courts exercise "original jurisdiction" over federal Administrative Procedure Act actions even though these actions involve deferential review of the findings of an administrative agency (*e.g.*, Br. 6-7). And if courts of "original jurisdiction" can

perform this type of review when the decision of a federal agency is at stake, then surely there is no jurisdictional bar to this type of review when the decision of a state or local agency is challenged under an analogous state administrative review law.

1. Respondents claim that federal courts cannot review the findings of state and local agencies because such review would be a forbidden "intru[sion] into the state's system of administrative review" (Br. 7). On this point, they claim support from this Court's decisions in *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). Even the Seventh Circuit, however, did not embrace respondents' reading of *Stude* and *Horton*. As we pointed out in our petition, the court of appeals acknowledged that the holdings in both *Stude* and *Horton* do not reach the question presented by this case. See Pet. 11-12; see also Pet. App. 11a. Moreover, even respondents do not believe that *Stude* or *Horton* erects any absolute bar to federal judicial review of state administrative decisions; as we explain in our petition, and as respondents acknowledge, *Horton* makes clear that a federal court may hear an attack on a state or local agency's decision if applicable state law provides for de novo review. See Pet. 11-12; Br. 4. It is more than passing strange that respondents can brand deferential review of a state or local agency's decision an "intrusion" into the state's system for reviewing agency decisions, yet concede, as they must, that a trial de novo on the propriety of an agency's decision is not.

Respondents are also incorrect when they argue that the majority of courts squarely line up behind the principle that federal "district courts are without jurisdiction to review on appeal the findings of state agencies . . . ." Br. 3, 4. Respondents characterize the decision in *Range Oil Supply Co. v. Chicago, R.I. & P.R. Co.*, 248 F.2d 477 (8th Cir. 1957), as a rogue opinion inconsistent with decisions in no fewer than seven other circuits. See

Br. 3-6. In truth, prior to the decision below only three circuits had decided the question presented here, and they had split 2-1. While the decision in *Range Oil Supply* was rejected in *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), and *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995), we explained in our petition why the other cases cited by respondents are in fact distinguishable (see Pet. 10-11 n.3), as did Judge Widener in his dissent in *Fairfax County* (see 64 F.3d at 162 n.4).

Even more important, *Range Oil Supply* represented settled law on this point for nearly 40 years. Until 1995, it was the only appellate decision on point, and as we explain in our petition, it was treated as established law by the leading commentators. See Pet. 10. Thus the decision below, as well as the two 1995 decisions on which it relied, have upset settled law in this area, and have rendered all of the litigation undertaken in reliance on *Range Oil Supply* jurisdictionally defective, and thus subject to collateral attack.

On this issue, respondents attempt to draw support from one of the leading commentators, whose treatise we cite in our petition: "A statutory proceeding in a state court to review an administrative determination is a civil action, unless the review proceeding is such an integral part of the administrative process as to constitute a continuation of the administrative proceeding." Br. 7-8 (quoting 1A James W. Moore, MOORE'S FEDERAL PRACTICE ¶ 0.157 [4.-3] at 73-74 & nn. 6-7 (2d ed. 1996)). But the exception to the scope of removal jurisdiction for an action that is part of the administrative process is not relevant here. The exception is applicable only to cases where the review proceeding concerned a ruling still pending before the administrative agency for decision, see *California Packing Corp. v. I.L.W.U. Local 142*, 253 F. Supp. 597, 598-99 (D. Hawai'i 1966), where the decision to be rendered in the review proceeding was a non-binding one, see *Decker v.*

Spicer Manufacturing Division of Dana Corp., 101 F. Supp. 207, 209-10 (N.D. Ohio 1951), or where the proceeding was not judicial in nature, see *Ex parte State of Oklahoma*, 37 F.2d 862, 864 (10th Cir. 1930). That simply does not describe this case. Here, the review required by applicable state law is "judicial review of 'final decisions' of [the] administrative agenc[y] . . . ." Pet. App. 16a. See also 735 ILCS para. 5/3-102 (1994). As the court observed in *Vann v. Jackson*, 165 F. Supp. 377 (E.D.N.C. 1958), "[r]ather than provide for a continuation of any administrative function," the review proceeding in federal court is "the point at which the administrative process ends, for the review provided is confined to a determination of *legal* issues by a *judicial* body." *Id.* at 380 (emphasis in original). On that basis, the court concluded that the review proceeding must be a "civil action." See *ibid.* Indeed, in *Stude*, the Court wrote that once a party aggrieved by an agency's decision takes "a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action subject to removal by the defendant to the United States District Court." 346 U.S. at 578-79. That same conclusion should be reached here.

2. Respondents' treatment of *Califano v. Sanders*, 430 U.S. 99 (1977), and related authority under the APA, on which we rely for our position that federal-question jurisdiction exists here for ICS's state-law claims, is particularly unsatisfying. Respondents observe that the APA instructs district courts to grant deference to the findings of federal administrative agencies. See Br. 7 & n.3. This overlooks the precise holding of *Califano v. Sanders*—that jurisdiction in the district court over APA actions is conferred by the federal-question statute (28 U.S.C. § 1331) and not the APA. See 430 U.S. at 104-08. Thus the grant of "original jurisdiction" over "civil actions" in Section 1331 plainly includes cases in which a district court must grant deferential and on-the-record review to an administrative decision.

Respondents' position, therefore, reduces to the claim that the phrases "original jurisdiction" and "civil action" mean one thing in the context of review of a decision of a federal administrative agency, and another in the context of review of a decision of a state administrative agency. There is surely no support in the text of either the federal-question or removal statute for this odd construction, nor do we see any reason why, if Congress has instructed federal courts to grant "quasi-appellate" review of the decisions of federal agencies, the district courts may not hear as "civil actions" within "original jurisdiction" the same kind of cases brought under state laws that similarly provide for deferential review. Indeed both the state and federal trial courts hear administrative cases—federal district courts under the APA and, in Illinois, state courts under its Administrative Review Law. See 735 ILCS para. 5/3-104 (1994). No one has ever thought the district court's APA deferential review to be an appellate proceeding, and it is no more appellate on review of a state administrative decision.

If there is any difference between the scope of jurisdiction to review the findings of federal and state agencies, then, it must rest not on any language actually in the pertinent jurisdictional statutes, which draw no distinction between federal and state administrative agencies, but on some principle of federalism articulated in neither the decision below nor in respondents' brief. Yet as we explain in our petition, and note again above, no theory of federalism could possibly support the conclusion reached by the Seventh Circuit here—that federal courts can review state and local agency action only de novo. See Pet. 13-14.

3. We also explain in our petition why, even if state-law claims seeking deferential review of a state or local agency's decision do not constitute "civil actions" within "original jurisdiction," they are at a minimum "claims" that may be heard if joined, as they were here, to federal constitutional attacks on the decision of a state or local

agency that are unquestionably within original jurisdiction. That is the plain import of the supplemental jurisdiction statute, 28 U.S.C. § 1367. On this point, respondents merely return to their argument that a district court cannot "function as both a court of original federal jurisdiction as well as a state quasi-appellate panel." Br. 10. The only statutory language that respondents have ever offered for their conclusion that district courts are without jurisdiction to grant deferential review are the phrases "original jurisdiction" and "civil action," which they read to forbid anything except de novo review of the decision of a state or local agency. Such a view is decidedly irrelevant to the supplemental jurisdiction statute, which permits a district court to exercise jurisdiction over any "claim" as long as it is joined with another claim that is within original jurisdiction and says nothing about "civil actions." And although ICS now characterizes its federal constitutional claims as "tangential" (Br. 9), it certainly believed in these claims strongly enough to file them. The City was entitled to have those federal claims heard in federal court and, under Section 1367, to bring the state-law claims along as well.

4. Respondents also contend that this case is not an appropriate vehicle to review the correctness of the holding below that an action is not removable if it contains even one claim that a federal district court may not hear. As we explain in our petition, the only authority on which the Seventh Circuit relied on this point, *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994), involved a claim that fell within the scope of Eleventh Amendment immunity. Respondents acknowledge that there is a split in the circuits on this point, but they attempt to distinguish these cases from the present one by the simplistic observation that this case does not involve the Eleventh Amendment. See Br. 10. This misses the point. The holding of both *Frances J.* and this case is that if any claim falls into a class of claims that a federal court is prohibited from hearing, the case is

not removable. And that holding is in square conflict with several decisions holding that the presence of one jurisdictionally barred claim does not prevent removal of the rest of the case. See Pet. 18. In short, the presence of a claim that receives deferential review operates, in the Seventh Circuit's view, identically to the Eleventh Amendment and deprives the district court of jurisdiction over the case. And if that is so, then the issue presented in *Frances J.* is raised in this case as well.

5. Finally, respondents fail to comment on what may be the most compelling aspect of the petition—that if the Court does not decide the jurisdictional question posed by this case now, it may never have the opportunity to do so. Because a district court's order remanding a case may not be reviewed on appeal, the remand order that the district court has been instructed to issue will never be reviewable, nor will future remand orders issued in reliance on the decision below. See Pet. 19-20. The Court is already effectively unable to review the soundness of the law on this point in the First and Fourth Circuits. If the Court denies review here, the Seventh Circuit's view will be insulated from review, as will the decisions of district courts in other circuits to remand cases in reliance on the law in these circuits. That, along with the fact that the decision below creates jurisdictional uncertainty and confusion, counsels for plenary review of this case at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 1997

No. 96-910

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,
v.
INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 4, 1996
CERTIORARI GRANTED APRIL 14, 1996

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Ordinance relating to the Commission on Chicago Historical and Architectural Landmarks, Municipal Code of Chicago, Illinois, §§ 2-120-580 to 2-120-920 [excerpts]	158

LIST OF OMITTED ITEMS

The following opinions, decisions, judgments and orders have been omitted from this Joint Appendix because they appear on the following pages in the appendices to the Petition for Writ of Certiorari:

Opinion of the United States District Court for the Northern District of Illinois, dated August 27, 1991 ..... 94a-96a

Opinion of the United States District Court for the Northern District of Illinois, dated December 30, 1994 ..... 26a-89a

Judgment of the United States District Court for the Northern District of Illinois, entered December 30, 1994 ..... 90a-91a

Order of the United States District Court for the Northern District of Illinois, dated December 30, 1994 ..... 92a-93a

Opinion of the United States Court of Appeals for the Seventh Circuit, dated August 1, 1996 ..... 1a-23a

Judgment of the United States Court of Appeals for the Seventh Circuit, entered August 1, 1996 ..... 24a-25a

Order of the United States Court of Appeals for the Seventh Circuit, dated November 4, 1996 ..... 97a-98a

RELEVANT DOCKET ENTRIES

CIVIL DOCKET FOR CASE NO. 91 CV 1587
Filed 3/15/91

DATE	PROCEEDINGS
3/15/91	NOTICE OF REMOVAL by City of Chicago defendants from the Circuit Court of Cook County, case number 91 CH 1361; Notice of Filing—Civil cover sheet.
	• • • •
4/10/91	MOTION by City defendants to dismiss pursuant to FRCP 12(b)(6).
4/10/91	MINUTE ORDER of 4/10/91 before the Honorable John F. Grady. Filed defendants' 12(b)(6) motion to dismiss. Motion of defendants to dismiss entered and stayed until the Court's decision on the motion to remand.
4/15/91	MOTION by plaintiffs to remand.
	• • • •
5/3/91	MEMORANDUM by plaintiffs in support of motion to remand.
5/24/91	MEMORANDUM by defendants in opposition to motion to remand.
7/16/91	REPLY by plaintiffs to response to motion to remand.
	• • • •
8/7/91	SURREPLY by defendant 1500 Lake Shore Drive to plaintiffs' reply memorandum in support of their motion to remand.
8/14/91	RESPONSE by plaintiffs to the surreply filed by defendant 1500 Lake Shore Drive to plaintiffs' memorandum in support of their motion to remand.
	• • • •
8/27/91	MEMORANDUM OPINION.
8/27/91	MINUTE ORDER of 8/27/91 before the Honorable John F. Grady. Enter Memorandum Opinion denying motion to remand.
	• • • •

DATE	PROCEEDINGS
9/10/91	MOTION by defendants to dismiss for lack of jurisdiction.
	• • • •
9/11/91	MEMORANDUM by defendants in support of motion to dismiss for lack of jurisdiction.
	• • • •
9/25/91	SUBSTITUTE MEMORANDUM by defendants in support of motion to dismiss for lack of jurisdiction.
	• • • •
10/15/91	MEMORANDUM by plaintiffs in opposition to defendants' motion to dismiss.
	• • • •
11/6/91	REPLY by defendants to response to motions to dismiss.
1/10/92	MEMORANDUM OPINION.
1/10/92	MINUTE ORDER entered 1/10/92 by the Honorable John F. Grady. Defendants' motions to dismiss plaintiffs' complaints in case numbers 91 C 1587 and 91 C 5564 are granted in part and denied in part.
	• • • •
2/21/92	FIRST CONSOLIDATED AMENDED COMPLAINT for administrative review by plaintiff United States Section of the International College of Surgeons, plaintiff International College of Surgeons, and plaintiff Robin Construction Corporation.
2/21/92	MEMORANDUM by plaintiff United States Section of the International College of Surgeons, plaintiff International College of Surgeons, and plaintiff Robin Construction Corporation in support of their motion for reconsideration.
	• • • •
3/30/93	MINUTE ORDER of 3/30/93 by the Honorable John F. Grady. Denying motion for reconsideration of the court's order of 1/10/92 dismissing certain claims with prejudice.

DATE	PROCEEDINGS
3/31/93	SUPPLEMENTAL MEMORANDUM by plaintiff Robin Construction Company, plaintiff International College of Surgeons, plaintiff United States Section of the International College of Surgeons in support of their motion for reconsideration.
	• • • •
11/8/93	SUMMARY STATEMENT OF FACTS AND MEMORANDUM OF LAW by plaintiffs Robin Construction Corporation, International College of Surgeons, and United States Section of International College of Surgeons in support of the consolidated complaint for administrative review.
11/8/93	APPENDIX filed by plaintiffs Robin Construction Corporation, International College of Surgeons, and United States Section of the International College of Surgeons regarding memorandum.
	• • • •
5/4/94	MEMORANDUM by defendants in support of their response to plaintiffs' consolidated complaint for administrative review.
	• • • •
7/29/94	REPLY by plaintiff United States Section of the International College of Surgeons, plaintiff International College of Surgeons, plaintiff Robin Construction Corporation to memorandum of law in support of consolidated complaint for administrative review.
12/30/94	MEMORANDUM OPINION
12/30/94	MINUTE ORDER of 12/30/94 by the Honorable John F. Grady: Memorandum Opinion entered. The Court enters summary judgment in favor of the defendants and against the plaintiffs. The Court also affirms the Commission's decisions denying plaintiffs' application for demolition permits and an economic hardship exception.
12/30/94	JUDGMENT ORDER

DATE	PROCEEDINGS
12/30/94	MINUTE ORDER of 12/30/94 by the Honorable John G. Grady: Judgment Order entered. Final judgment is hereby entered on the plaintiffs' First Amended Consolidated Complaint for Administrative Review, terminating case.
1/27/95	NOTICE OF APPEAL by the United States Section of the International College of Surgeons, International College of Surgeons, and Robin Construction Corporation from scheduling order terminating case, from motion minute order, from judgment, from motion minute order, and from order.
1/27/95	JURISDICTIONAL STATEMENT by United States Section of the International College of Surgeons, International College of Surgeons, and Robin Construction Corporation regarding appeal.
	• • • •
11/6/96	CERTIFIED COPY of the order from the 7th Circuit.
	• • • •
2/5/97	ORDER.
2/5/97	MINUTE ORDER of 2/5/97 by the Honorable John F. Grady. It is ordered that the case numbered 91 C 1587 be remanded for appropriate resolution in the Circuit Court of Cook County, Illinois, remanding the case to state court and terminating the case.

CIVIL DOCKET FOR CASE NO. 91 CV 5564
Filed 09/03/91

DATE	PROCEEDINGS
9/3/91	NOTICE OF REMOVAL by defendants from the Circuit Court of Cook County, case number 91 CH 7289—Civil cover sheet.

DATE	PROCEEDINGS
9/4/91	MOTION by defendants for relatedness to consolidate cases; notice of motion.
9/4/91	MINUTE ORDER of 9/4/91 before the Honorable John F. Grady. (This order concerns consolidated case number 91 C 1587.) On motion of defendants, order entered consolidating related cause number 91 C 1587 with the above-captioned case.
	• • • •
9/10/91	12(b)(6) MOTION by defendants to dismiss.
	• • • •
9/11/91	MEMORANDUM by defendants in support of 12(b)(6) motion to dismiss.
	• • • •
11/6/91	REPLY by defendants to response to motion to dismiss.
2/21/92	FIRST AMENDED CONSOLIDATED COMPLAINT for administrative review by plaintiff Robin Construction Corporation, plaintiff International College of Surgeons, and plaintiff United States Section of the International College of Surgeons, plaintiff International College of Surgeons.
2/21/92	MEMORANDUM by plaintiff Robin Construction Corporation, plaintiff International College of Surgeons, and plaintiff United States Section of the International College of Surgeons in support of motion for reconsideration.
	• • • •
3/30/93	MINUTE ORDER of 3/30/93 by the Honorable John F. Grady. Plaintiffs' motion for reconsideration of the court's order of 1/10/92, dismissing certain claims with prejudice, is denied.
	• • • •
3/31/93	SUPPLEMENTAL MEMORANDUM by plaintiff United States Section of the International College of Surgeons, plaintiff International College of

DATE	PROCEEDINGS
	Surgeons, and plaintiff Robin Construction Corporation in support of their motion for reconsideration.
	• • • •
4/28/93	MINUTE ORDER of 4/28/93 by the Honorable John F. Grady. Defendants' motion to dismiss is granted in part and denied in part as set forth in Memorandum Opinion and Minute Order.
	• • • •
12/30/94	JUDGMENT ORDER.
12/30/94	MINUTE ORDER of 12/30/94 by the Honorable John F. Grady. Enter Judgment Order. Final judgment entered on the plaintiffs' First Amended Consolidated Complaint for Administrative Review.
12/30/94	MEMORANDUM, OPINION, AND ORDER.
12/30/94	MINUTE ORDER of 12/30/94 by the Honorable John F. Grady. Enter memorandum opinion. The court will enter summary judgment in favor of the defendants and against the plaintiffs. The court will also affirm the Commission's decisions denying plaintiffs' applications for demolition permits and an economic hardship exception.
12/30/94	MEMORANDUM OPINION.
12/30/94	JUDGMENT ORDER.
1/27/95	NOTICE OF APPEAL by Robin Construction Corporation, International College of Surgeons, and the United States Section of the International College of Surgeons.
1/27/95	JURISDICTIONAL STATEMENT by Robin Construction Company, International College of Surgeons and United States Section of the International College of Surgeons regarding appeal.
	• • • •

DATE	PROCEEDINGS
12/2/96	CERTIFIED COPY of order from the 7th Circuit. Judgment of the District Court is reversed, with costs, and the case is remanded, in accordance with the decision of this court entered on this date.
	• • • •
2/5/97	MINUTE ORDER of 2/5/97 by the Honorable John F. Grady. Order entered. It is ordered that the case numbered 91 C 5564 be remanded for appropriate resolution in the Circuit Court of Cook County, Illinois, terminating case.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
95-1293

DATE	PROCEEDINGS
2/6/95	Private civil case docketed.
2/6/95	Filed JURISDICTIONAL STATEMENT of Appellant International College of Surgeons, Appellant United States Section of the International College of Surgeons, and Appellant Robin Construction Corporation.
	• • • •
2/13/95	ORDER: The court orders these appeals consolidated for purposes of briefing and disposition.
	• • • •
5/22/95	Filed 15c Appellants' brief.
5/22/95	Filed 10c appendix by Appellants.
	• • • •
9/1/95	Filed 15c Appellees' brief by City of Chicago, et al.
	• • • •
9/25/95	Filed 15c Appellants' reply brief.

DATE	PROCEEDINGS
10/5/95	ORDER: Argument set for Monday, November 6, 1995 at 10:30 a.m. Each side limited to 30 minutes.
11/6/95	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Kenneth F. Ripple, Judge Walter J. Skinner.
11/13/95	Appellants Robin Construction Corporation, United States Section of the International College of Surgeons and the International College of Surgeons filed post argument memorandum.
11/13/95	Appellees filed post argument memorandum.
	* * * *
6/4/96	Appellees filed Citation of Additional Authority per Circuit Rule 28(j).
8/1/96	Filed opinion of the court by Judge Ripple. REVERSED AND REMANDED.
8/1/96	ORDER: Final judgment filed per opinion with costs.
	* * * *
9/5/96	Filed 25c Petition for Rehearing with Suggestion for Rehearing En Banc by Appellees.
	* * * *
9/19/96	Filed 30c CORRECTED Petition for Rehearing with Suggestion for Rehearing En Banc by Appellees.
9/26/96	Sent copy of request to Appellants requesting their Answer to the Petition for Rehearing with Suggestion for Rehearing En Banc filed by the Appellees on 9/19/96.
10/10/96	Filed 25c Answer of Appellants Robin Construction Corporation, United States Section of the International College of Surgeons and the International College of Surgeons in Nos. 95-1315 and 95-1293 to Petition for Rehearing with Suggestion for Rehearing En Banc.

DATE	PROCEEDINGS
11/4/96	ORDER: Petition for Rehearing with Suggestion for Rehearing En Banc is DENIED.
	* * * *
12/2/96	MANDATE issued and entire record returned with bill of costs.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
95-1315

DATE	PROCEEDINGS
2/7/95	Private civil case docketed.
	* * * *
2/7/95	Appellant International College of Surgeons, Appellant United States Section of the International College of Surgeons, and Appellant Robin Construction Corporation filed jurisdictional statement.
2/13/95	ORDER: The court orders these appeals consolidated for purposes of briefing and disposition.
	* * * *
5/22/95	Filed 15c Appellants' brief.
5/22/95	Filed 10c appendix by Appellants.
	* * * *
9/1/95	Filed 15c Appellees' brief by city of Chicago, et al.
9/25/95	Filed 15c Appellants' reply brief.
10/5/95	ORDER: Argument set for Monday, November 6, 1995 at 10:30 a.m. Each side limited to 30 minutes.
11/6/95	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Kenneth F. Ripple, and Judge Walter J. Skinner.
	* * * *

DATE	PROCEEDINGS
11/13/95	Appellants filed post argument memorandum.
11/13/95	Appellees filed post argument memorandum.
	• • • •
6/4/96	Filed Appellees' Citation of Additional Authority per Circuit Rule 28(j).
8/1/96	Filed opinion of the court by Judge Ripple: Reversed & remanded. Circuit Judge William J. Bauer, Circuit Judge Kenneth F. Ripple, and Judge Walter J. Skinner.
8/1/96	ORDER: Final judgment filed per opinion with costs.
	• • • •
9/5/96	Filed 25c Petition for Rehearing with Suggestion for Rehearing En Banc by Appellees.
	• • • •
9/19/96	Filed 30c CORRECTED Petition for Rehearing with Suggestion for Rehearing En Banc by Appellees.
9/26/96	Sent copy of request to Appellants requesting 30c of their Answer to the Petition for Rehearing with Suggestion for Rehearing En Banc filed by the Appellees on 9/19/96.
10/10/96	Filed 25c Answer of Appellants to Petition for Rehearing with Suggestion for Rehearing En Banc.
11/4/96	ORDER: Denied Petition for Rehearing with Suggestion for Rehearing En Banc of Appellees.
	• • • •
12/2/96	MANDATE issued and entire record returned with bill of costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 1587

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation and UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,

Plaintiffs,

v.

THE CITY OF CHICAGO, a municipal corporation, and its COMMISSION ON CHICAGO LANDMARKS, ITS COMMISSIONERS PETER C. B. BYNOE, Chairman, IRVING J. MARKIN, Vice-Chairman, THOMAS E. GRAY, Secretary, JOHN W. BAIRD, JOSUE GONZALES, AMY R. HECKER, DAVID R. MOSENA, MARIAN DESPRES and CHARLES SMITH, and DANIEL W. WEIL, Commissioner of Department of Buildings of the City of Chicago, 1500 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, and THE NORTH STATE, ASTOR, LAKE SHORE DRIVE ASSOCIATION, a not-for-profit corporation,

Defendants.

NOTICE OF REMOVAL

To the Judges of the United States District Court for the Northern District of Illinois:

Defendants City of Chicago ("City"), Commission on Chicago Landmarks, Peter C. B. Bynoe, Irving J. Markin, Thomas E. Gray, John W. Baird, Josue Gonzales, Amy R. Hecker, David R. Mosena, Marian Despres, Charles Smith, and Daniel W. Weil ("City Defendants"), hereby

remove the above-entitled action pursuant to 28 U.S.C. section 1441(b). No appearance or motion is made for unnamed or unserved parties. In support of their removal, the City Defendants state as follows:

1. The City Defendants are defendants in a civil action commenced on February 13, 1991, in the Circuit Court of Cook County of the State of Illinois, No. 91 CH 1361, styled *INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation and UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation v. THE CITY OF CHICAGO, a municipal corporation, and its COMMISSION ON CHICAGO LANDMARKS, ITS COMMISSIONERS, PETER C. B. BYNOE, Chairman, IRVING J. MARKIN, Vice-Chairman, THOMAS E. GRAY, Secretary, JOHN W. BAIRD, JOSUE GONZALES, AMY R. HECKER, DAVID R. MOSENA, MARIAN DESPRES and CHARLES SMITH, and DANIEL W. WEIL, Commissioner of Department of Buildings of the City of Chicago, 1500 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, and THE NORTH STATE, ASTOR, LAKE SHORE DRIVE ASSOCIATION, a not-for-profit corporation.* A copy of the complaint and summons, and an affidavit filed pursuant to § 3-105 of the Illinois Code of Civil Procedure in the proceeding are attached hereto.

2. The action alleges that the Landmark Ordinance of the City of Chicago violates the United States Constitution and that certain actions of defendant Commission on Chicago Landmarks ("Commission") violated plaintiffs' rights under the United States Constitution. Plaintiffs request that the court find the Landmark Ordinance unconstitutional on its face and as applied to the property that is the subject of the action. The specific allegations which raise issues under federal law are paraphrased below.

a. The Landmark Ordinance is allegedly unconstitutional on its face in violation of the due process provisions of the Constitution of the United States, in that it authorizes the Commission to preliminarily designate private property as a landmark without giving property owners prior notice or an opportunity to present evidence in opposition to the preliminary landmark designation.

Complaint, para. 16(a).

b. The Landmark Ordinance is allegedly unconstitutional on its face in violation of the equal protection and due process provisions of the United States Constitution, in that it authorizes landmark designation of buildings owned by not-for-profit corporations, while excluding from landmark designations buildings owned by religious organizations and used primarily as a place for the conduct of religious ceremonies.

Complaint para. 16(d).

c. The designation of the subject property as a landmark allegedly constitutes a taking of property of the Plaintiffs without just compensation in violation of the Fifth Amendment and Fourteenth Amendment to [the] Constitution of the United States.

Complaint, para. 16(e).

d. The Designation Ordinance as applied to the Subject Property allegedly denies Plaintiffs equal protection of the law and deprives Plaintiffs of [their] property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States in that it arbitrarily and capriciously designates every facade of every building in the district as protected by the district designation, whereas, on information and belief, Plaintiffs allege that the Commission has

recommended and the City Council of Chicago, by the enactment of other designation ordinances, has enacted landmark districts which have designated as landmarks only those portions of the buildings in the district that can be seen from the public right-of-way.

Complaint, para. 16(g).

e. The Commission allegedly deprived Plaintiffs of their right to a fair, independent and impartial consideration of their plans to develop the Subject Property and have violated Plaintiffs' rights of due process and equal protection.

Complaint, paras. 16(h), (j), and (k).

f. The Decision, being based upon a hearing at which Plaintiffs allegedly were not afforded a full and fair hearing and where Plaintiffs allegedly were not permitted to present evidence concerning the proposed new construction on the Subject Property when the Commission was required to consider such evidence by its Rules and Regulations is allegedly arbitrary, capricious and violates procedural due process and as such is unconstitutional and void.

Complaint, para. 16(i).

g. The Commission allegedly deprived Plaintiffs of their right to due process under the Constitution of the United States by refusing to permit Plaintiffs to present evidence in support of their contention that the Designation Ordinance is arbitrary, capricious and unreasonable.

Complaint, para. 16(n).

3. This Court has original jurisdiction to hear suits to redress violations of rights guaranteed by the United States Constitution pursuant to 28 U.S.C. sections 1331 and 1343. Petition[ers] are entitled to remove this action

pursuant to the provisions of 28 U.S.C. section 1441(b), in that it appears from the face of plaintiffs' complaint that this is a civil rights complaint which arises under the United States Constitution, and the matter involves a federal question.

4. The other defendants in this proceeding, 1500 Lake Shore Drive Building Corporation and the North State, Astor, Lake Shore Drive Association have consented to the removal of this suit to federal court.

WHEREFORE, Petitioners pray that the above-described action now pending in the Circuit Court of Cook County be removed therefrom to this Court.

Respectfully submitted,

KELLY R. WELSH
Corporation Counsel of the
City of Chicago

By: /s/ Craig J. Hanson
CRAIG J. HANSON
Assistant Corporation Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 1587

(Caption Omitted)

NOTICE OF FILING

PLEASE TAKE NOTICE that on March 15, 1991, I filed with the Clerk of the above Court Defendants City of Chicago, Commission on Chicago Landmarks, Peter C. B. Bynoe, Irving J. Markin, Thomas E. Gray, John W. Baird, Josue Gonzales, Amy R. Hecker, David R. Mosena, Marian Despres, Charles Smith, and Daniel W. Weil's Appearance and Notice of Removal, copies of which are attached hereto and hereby served upon you.

KELLY R. WELSH
Corporation Counsel of the
City of Chicago

By: /s/ Craig J. Hanson
CRAIG J. HANSON
Assistant Corporation Counsel

RUTH MOSCOVITCH
CRAIG J. HANSON
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[Certificate of Service Omitted]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

No. 91 CH 01861

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation and UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,

Plaintiffs,

v.

THE CITY OF CHICAGO, a municipal corporation, and its COMMISSION ON CHICAGO LANDMARKS, ITS COMMISSIONERS, PETER C.B. BYNOE, Chairman, IRVING J. MARKIN, Vice-Chairman, THOMAS E. GRAY, Secretary, JOHN W. BAIRD, JOSUE GONZALES, AMY R. HECKER, DAVID R. MOSENA, MARIAN DESPRES and CHARLES SMITH, and DANIEL W. WEIL, Commissioner of Department of Buildings of the City of Chicago, 1500 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, and THE NORTH STATE, ASTOR, LAKE SHORE DRIVE ASSOCIATION, a not-for-profit corporation,

Defendants.

COMPLAINT FOR ADMINISTRATIVE REVIEW

Plaintiffs, INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corpor-

ation, by their attorneys DANIEL L. HOULIHAN, DANIEL L. HOULIHAN & ASSOCIATES, LTD., and RICHARD J. BRENNAN and TERI LEE FERRO, WINSTON & STRAWN, complaint against THE CITY OF CHICAGO, a municipal corporation, and its Administrative Agency, the COMMISSION ON CHICAGO LANDMARKS, and ITS COMMISSIONERS, PETER C.B. BYNOE, Chairman, IRVING J. MARKIN, Vice-Chairman, THOMAS E. GRAY, Secretary, JOHN W. BAIRD, JOSUE GONZALES, AMY R. HECKER, DAVID R. MOSENA, MARIAN DESPRES, and CHARLES SMITH, and DANIEL W. WEIL, Commissioner of Department of Buildings of the City of Chicago, 1500 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, and THE NORTH STATE, ASTOR, LAKE SHORE DRIVE ASSOCIATION, a not-for-profit corporation, defendants, and allege as follows:

1. Plaintiff, International College of Surgeons, is a not-for-profit corporation organized and existing under the laws of the District of Columbia, and Plaintiff, United States Section of the International College of Surgeons is a not-for-profit corporation organized and existing under the laws of the District of Columbia, collectively referred to herein as "the College." The College maintains its principal offices in Chicago, Illinois.

2. Robin Construction Corporation ("Robin") is a corporation licensed and authorized to do business in the State of Illinois, engaged in the real estate development business including the development and the construction of buildings used as multiple family dwellings. By virtue of certain contracts, Robin is a contract purchaser and principal developer of the Subject Property described in paragraph 8 hereof.

3. Defendant, The City of Chicago, is a municipal corporation organized and operating pursuant to the laws of Illinois in the County of Cook, which by an ordinance

adopted by the City Council [of] Chicago on March 11, 1987, hereinafter referred to as the "Landmarks Ordinance" (Municipal Code of Chicago, Chapter 21, Sections 21-62 through 21-95), created and constituted the defendant the Commission on Chicago Landmarks (the "Commission") as an administrative agency authorized to make final decisions within the meaning of the Administrative Review Act (Ill.Rev.Stat. 1990, Ch. 110, ¶¶ 3-101, et seq.).

4. Defendant, Peter C.B. Bynoe, is the Chairman of the Commission and presided as the Hearing Officer at the public hearing described herein. The defendants, Irving J. Markin, Thomas E. Gray, John W. Baird, Josue Gonzales, Amy R. Hecker, David R. Mosena, Marian Despres and Charles Smith, are all of the other Commissioners of the Commission, all of whom acted together as the Commission.

5. Defendant, Daniel W. Weil, is the Commissioner of Department of Buildings of the City of Chicago, and is designated by the Municipal Code of Chicago as the official responsible for the issuance of demolition and building permits.

6. Defendant, 1500 Lake Shore Drive Building Corporation, is a for-profit corporation organized and existing under the laws of the State of Illinois, which was granted "Party Status" by the Commission at a public hearing on December 18, 1990, concerning the demolition permits and proposed redevelopment which are the subject of this proceeding.

7. Defendant, The North State, Astor, Lake Shore Drive Association is a not-for-profit corporation organized and existing under the laws of the State of Illinois, which was granted "Party Status" by the Commission at a public hearing on December 18, 1990, concerning the demolition permits and proposed redevelopment which are the subject of this proceeding.

8. Plaintiffs, the College, are the owners, as tenants-in-common, of two parcels of real estate situated in the City of Chicago commonly known as 1516-1524 North Lake Shore Drive, Chicago, Cook County, Illinois (the "Subject Property"). The Subject Property is improved with two buildings which the College has owned for more than 40 years, and in which the College operates its administrative headquarters and the International Museum of Surgical Science and Hall of Fame ("Museum").

9. On June 28, 1989, the City Council of the City of Chicago, pursuant to the recommendation of the defendant Commission, enacted a designation ordinance known as "The Seven Houses on Lake Shore Drive District Ordinance" (the "Designation Ordinance") wherein it designated the Subject Property and five other parcels as a Landmark District, referred to herein as the "Seven House District." Such action was taken pursuant to the Landmark Ordinance. The inclusion of the Subject Property within the Seven House District was made over the objection of the College.

10. On or about October 5, 1990, Plaintiffs caused to be filed with the City of Chicago, Department of Buildings, four demolition permit applications, which applications sought permits for the demolition of certain portions of the rear of the main buildings and the coach houses now existing on the Subject Property as part of Plaintiffs' redevelopment request for the Subject Property. Pursuant to the provisions of the Landmark Ordinance, the Department of Buildings referred the demolition applications to the Commission on October 10, 1990.

11. On October 23, 1990, the Commission, pursuant to Section 21-79 of the Landmark Ordinance, made a preliminary decision that the buildings to be demolished would adversely affect or destroy a significant historical and architectural feature of the improvements in the Seven House District, referred to by the Commission as

"critical features," and issued its preliminary decision disapproving the applications for demolition permits.

12. On November 6, 1990, pursuant to Plaintiffs' request under Section 21-82 of the Landmark Ordinance, the Commission held an informal conference with Plaintiffs. During said conference Plaintiffs were permitted to present a partial description of their plans for a proposed redevelopment of the Subject Property. Plaintiffs' proposed redevelopment will preserve and maintain the east forty feet of the two principal buildings which front on North Lake Shore Drive in their present form. Plaintiffs allege that their redevelopment plans will preserve and maintain all of the critical features of the Subject Property, including certain rooms occupied by the Museum even though no portion of the interiors of any of the buildings in the Seven House District are protected by the Designation Ordinance. At the informal conference, the Commission ruled that Plaintiffs' plans for the redevelopment of the property were not material to its consideration of the demolition permits and that it would not consider any evidence pertaining to the redevelopment. As a result of the Commission's refusal to consider or review Plaintiffs' proposed redevelopment plan, the Commission and Plaintiffs were unable to reach an accord as provided for in Section 21-82 at the informal conference or at any time thereafter.

13. On December 18, 1990, a public hearing was held pursuant to Section 21-83 of the Landmark Ordinance at which Plaintiffs offered evidence to prove that Plaintiffs' redevelopment plan, including the demolition permits, should be approved and issued. As the record of the public hearing reflects, Plaintiffs were prevented from presenting any evidence in support of their proposed redevelopment of the property and plaintiffs were permitted only to present evidence concerning the portions of the buildings to be demolished without regard to the contemporaneous redevelopment of the Subject Property.

Plaintiffs were not permitted to present evidence describing Plaintiffs' proposed redevelopment on the Subject Property notwithstanding the fact that such evidence must be considered under the express provisions of the Landmark Ordinance and the Commission's Rules and Regulations. The Commission's refusal to permit any evidence of the proposed redevelopment denied Plaintiffs their rights to present evidence that was material and relevant to the issues and thereby denied Plaintiffs due process of law. Plaintiffs were further denied due process at said public hearing in that the Hearing Officer, the Commission's Chairman, Peter C.B. Bynoe, refused to permit Plaintiffs to make any offer of proof of any evidence describing the new construction which Plaintiffs proffered and which the Hearing Officer refused to receive in evidence.

14. On January 9, 1991, the Commission rendered a final administrative decision; a copy of the Finding and Decision of the Commission, marked "Exhibit A," is attached hereto and made a part hereof, and is hereinafter referred to as the "Decision."

15. The Decision adversely affects the legal rights and privileges of the Plaintiffs, and terminated the proceedings before the Commission. A copy of the Decision was served upon Plaintiffs on January 10, 1991.

16. Judicial review of the Decision is sought because the decision is erroneous, illegal and void for one or more of the following reasons:

a. The Landmark Ordinance upon which the Decision is predicated is unconstitutional on its face in that in violation of the due process provisions of the Constitution of the State of Illinois and the Constitution of the United States, it authorizes the Commission, pursuant to Section 21-67 of the Landmark Ordinance, to preliminarily designate private property as a landmark, whereupon an owner is thereby effectively prevented from demolishing existing structures or constructing new structures that would otherwise be legally permitted under existing land use and building code regulations. The Landmark Ordinance authorizes such preliminary designation without giving the owners of such property prior notice of such landmark action or an opportunity to present evidence in opposition to the landmark designation before the Commission makes its preliminary determination which designates the owner's property as a landmark. In addition, the ordinance permits such preliminary designation of landmark status to remain in full force and effect without notice to the owner or an opportunity for a hearing for an indefinite and indeterminate period of time, that is until the Commission, at its sole discretion, elects to give notice to the owner of the preliminary determination action it has taken.

b. The Landmark Ordinance is unconstitutional on its face in that in violation of the Constitution of the State of Illinois it delegates to the Landmark Commission the legislative power to designate landmark districts consisting of private property without providing legally sufficient criteria to be applied by the Commission or the City Council in designating a landmark district.

c. The Landmark Ordinance is unconstitutional on its face in that in violation of the Constitution of the State of Illinois, Section 21-77, [it] purports to authorize and delegate to the Commission the legislative power to approve permits for alteration, reconstruction, erection, demolition, relocation or other work only upon the approval of the Commission without providing legally sufficient criteria to be applied by the Commission in determining whether to approve such permit applications.

d. The Landmark Ordinance is unconstitutional on its face in that in violation of the equal protection and due process provisions of the Constitution

of the State of Illinois and the Constitution of the United States, it authorizes the landmark designation of buildings owned by not-for-profit corporations that have obtained and maintain tax exempt status from the State of Illinois and the Internal Revenue Service of the United States, while excluding from landmark designation buildings owned by religious organizations and used primarily as a place for the conduct of religious ceremonies.

e. The Designation Ordinance is unconstitutional as applied in that by designating the Subject Property as a landmark it has prevented the Plaintiffs from implementing their development plans which were adopted and decided upon prior to the enactment of the Designation Ordinance and as such takes the property of the Plaintiffs without just compensation in violation of the taking provisions of Section 2 of Article I of the Constitution of the State of Illinois and the Fifth Amendment and Fourteenth Amendment to Constitution of the United States.

f. The Designation Ordinance is illegal and unconstitutional in that it arbitrarily and capriciously groups seven non-continguous buildings into one purported landmark district when the seven buildings cannot be viewed as one unified district having common characteristics or features, and in excluding from the Seven House District buildings situated between the designated buildings which have equal or greater landmark characteristics and qualities than the buildings included in the Seven House District.

g. The Designation Ordinance as applied to the Subject Property denies Plaintiffs equal protection of the law and deprives Plaintiffs of its property without due process of law, in violation of Section 2 of Article I of the Illinois Constitution and of the Fifth and Fourteenth Amendments to the Constitution of the United States in that it arbitrarily and capri-

ciously designates every facade of every building in the district as protected by the district designation. On information and belief, Plaintiffs allege that the Commission has recommended and the City Council of Chicago, by the enactment of other designation ordinances, has created nineteen other landmark districts; that all other designation ordinances creating landmark districts have designated as landmarks only those portions of the buildings in the district that can be seen from the public right-of-way which satisfy the criteria of the Landmark Ordinance. The Commission's professional staff in its analysis of landmark criteria applicable to the Seven Houses on Lake Shore Drive expressly stated with respect to the Subject Property:

> As is the case with all districts designated by the Commission, critical features are defined as only those parts of the buildings visible from the public way.

The Commission, having been advised by the College of its plans for the redevelopment of the Subject Property by the construction of a new building on the rear of the Subject Property, recommended and the City Council, in enacting the Seven House District Ordinance, designated as protected by the district designation every facade of every building in the Seven House District solely for the purpose of preventing Plaintiffs' proposed redevelopment. Thereafter, the City permitted the owners of two other buildings in the Seven House District, to wit: 1250 and 1254 North Lake Shore Drive, Chicago, Illinois to demolish portions of existing buildings and to construct substantial additions to those buildings. The Commission's refusal to permit Plaintiffs to demolish structures that cannot be seen from the public way and permitting the owners of the other building[s] in the Seven House District to demolish portions of existing buildings and to construct substantial addi-

tions to those buildings is arbitrary, capricious and unreasonable and an unconstitutional denial of Plaintiffs' right to equal protection and due process.

h. The Commission in violation of its designated purpose and in breach of its powers and duties as an administrative agency willfully and deliberately acted in a way designed and intended to deprive Plaintiffs of their right to a fair, independent and impartial consideration of their plans to redevelop the Subject Property. The Commission's actions with respect to Plaintiffs' proposed redevelopment have deprived Plaintiffs of their rights of due process and equal protection and the protections and benefits provided owners of property under the Landmark Ordinance by reason of the following actions and conduct of the defendants:

(i) At the Commission's regular meeting on June 1, 1988, the Commission's staff recommended the creation of the Seven House District. At its next regular meeting on July 6, 1988, the Commission made a preliminary determination pursuant to Section 21-67 of the Landmark Ordinance that the Seven House District satisfied one or more of the Landmark Ordinance criteria for designation as a landmark district.

(ii) On or about February 1, 1989, the College presented to the Commission's Permit Review Committee its plans for the redevelopment of the Subject Property. [The] College advised the Commission that for many years it had plans to redevelop the Subject Property, which plans had been adopted by the College prior to the time the Commission took any action with respect to the Seven House District.

(iii) Upon learning of the College's antecedent plans to redevelop the Subject Property,

the Commission proceeded on a course of conduct that was designed and intended to foreclose any possible redevelopment of the Subject Property. The Commission's actions thereafter were in all respects adversarial to Plaintiffs' redevelopment plans, and as such were in direct violation of the Commission's duty to provide Plaintiffs with an impartial and fair hearing and evaluation of its redevelopment plans and in violation of its duty to assist owners with the future use, rehabilitation and redevelopment of both designated or potential landmarks or structures in landmark districts, as required by Section 21-65 of the Landmark Ordinance.

(iv) The Commission's course of conduct which was intended to foreclose any possible future redevelopment of the Subject Property and demonstrates the bias and adversarial position of the Commission toward Plaintiffs which was evidenced by numerous actions of the Commission, including, but not limited to the following:

(A) After being informed of the College's plans for the redevelopment of the Subject Property, the Commission prepared a draft ordinance and recommendation to the City Council that was drafted in such a way as to designate not only the portion of the buildings on the Subject Property that can be seen from the public way but all of the exterior faces of all of the structures and all of the "streetscapes" within the boundaries of the proposed District, thereby precluding any possible future redevelopment on the Subject Property, notwithstanding the fact that the Commission's staff had recommended in its original recommendation to the Commission that only

those parts of the buildings that could be seen from the public way would be protected by the creation of the Seven House District.

(B) The proceedings conducted at the informal conference held on November 6, 1990 pursuant to Section 21-82 demonstrate the open hostility of the Commission and its members to Plaintiffs and their proposed redevelopment.

(C) The Commission's refusal to consider any evidence describing the proposed development at the Public Hearing held on December 18, 1990, including the unjustified and arbitrary refusal of the Commission to permit Plaintiffs to make any offer of proof of any of the testimony or exhibits the Hearing Officer refused to receive in evidence.

(D) The Commission's retention of two expert witnesses to testify in opposition to Plaintiffs' application.

(E) The restrictions and limitations imposed by the Commission on Plaintiffs' expert witness' efforts to testify that the Designation Ordinance was fatally flawed in that it arbitrarily included seven buildings on North Lake Shore Drive while excluding other buildings that possessed historical and architectural characteristics that were equal to or greater than those found in the seven houses.

(F) Notwithstanding Plaintiffs' request that they be permitted to submit a memorandum or brief in support of the applications for demolition permits and the proposed plan for redevevolpment, the Commission ruled that it would not consider any such written submission and would not permit Plaintiffs to file or submit any brief or memorandum.

(G) At the Commission's Regular meeting on January 9, 1991, the Commission ruled that the College's application, previously filed with the Commission pursuant to Section 21-76 of the Landmark Ordinance requesting that the Commission initiate an amendment to the Designation Ordinance, offered no evidence nor provided any rationale based upon the landmark criteria that would cause the Commission to reconsider the boundaries of the Seven House District or any other amendment to the Designation Ordinance. The Commission made such ruling notwithstanding the fact that the Commission gave Plaintiffs no opportunity to present evidence in support of its application to amend the Designation Ordinance, and in fact denied Plaintiffs' request for an opportunity to present evidence in support of its application to amend the Designation Ordinance.

(H) At the Commission's Regular Meeting on January 9, 1991, the Commission ruled that a Substitute Ordinance, which was introduced by Plaintiffs in the City Council of Chicago seeking to amend the Designation Ordinance and which was referred to the Commission by the City Council Committee on Historical Landmark Preservation, be denied since Plaintiffs offered no new evidence that would cause the Commission to consider changing the boundaries of the Seven House Dis-

trict or amending the Designation Ordinance in any other respect. The Commission made such ruling notwithstanding the fact that the Commission gave Plaintiffs no opportunity to present evidence on the Substitute Ordinance, and in fact denied Plaintiffs' request for an opportunity to present evidence in support thereof.

(I) The record of the Commission's proceeding on January 9, 1991 on Plaintiffs' application for four demolition permits as part of its redevelopment plan shows that the Commission willfully and deliberately ignored the requirements of Sections 21-83 of the Ordinance that within thirty (30) days after the conclusion of the hearing it issue a written decision which shall contain the Commission's Findings of Fact that constitute the basis for its decision. The motion to deny the Plaintiffs' application, which was made by the Chairman who stated that the language of the motion had been prepared by the Commission's staff and counsel, contained no Findings of Fact whatsoever. When counsel for Plaintiffs objected to the absence of any Findings of Fact as required by Section 21-83, the Chairman directed the Commission members to bring before them the Findings of Fact that had been previously prepared and distributed to the Commissioners. The Chairman then moved to amend the motion to deny by adding that the then just disclosed Findings of Fact be approved. At no time prior to or during the proceedings held on January 9, 1991 was a copy of the Findings of Fact provided to Plaintiffs' counsel. In further

> violation of the Commission's obligation to consider the evidence and the merits of Plaintiffs' application fairly, impartially and at an open meeting, the record affirmatively reflects that the Commission, without a single word of discussion or analysis, adopted verbatim the Findings of Fact that had been previously prepared by persons other than the Commission members.

Plaintiffs allege that the foregoing actions of the Commission demonstrate that the Commission did not provide Plaintiffs with the open, fair and impartial consideration that due process requires of an administrative agency. The Commission, from the beginning of these proceedings through their conclusion, was an adversary that openly, notoriously and persistently oposed and prevented any impartial or fair consideration of Plaintiffs' position.

i. The Decision, being based upon a hearing at which Plaintiffs were not afforded a full and fair hearing and where Plaintiffs were not permitted to present evidence concerning the proposed new construction on the Subject Property, when the Commission was required to consider such evidence by its Rules and Regulations is arbitrary, capricious and the product of a denial of procedural due process and as such is unconstitutional and void.

j. The Commission erroneously interpreted the Landmark Ordinance by restricting its inquiry to a determination as to:

> whether or not the properties proposed for demolition contribute to the character of the district and what effect, if any, their removal will have on the character of the district. (Decision, p.3)

The Commission's Rules and Regulations provide in pertinent part:

> The Commission will consider allowing the demolition of such non-contributing improvements within designated districts based on the following *two* conditions: (1) the property proposed for demolition is deemed to be non-contributing to the character of the district, and its removal will not have a negative effect on the character of the district; and (2) *the proposed redevelopment of the property is reviewed and approved by the Commission under Section D following, and a binding agreement is signed between the Commission and the applicant which defines the character of the new development.* (Rules and Regulations, Article IV, Section C, emphasis added.)

Notwithstanding the Commission's obligation imposed by the express provisions of the Landmark Ordinance and its Rules and Regulations to consider Plaintiffs' proposed redevelopment, the Commission refused to consider any evidence proffered by Plaintiffs describing its proposed redevelopment, and willfully and deliberately refused to permit Plaintiffs to make any offer of proof that would make a record of such proposed redevelopment in flagrant disregard and violation of Plaintiffs' constitutional right to a full, fair and impartial hearing.

k. The Commission having erroneously defined the issue before it under the Landmark Ordinance as being whether the property proposed for demolition is deemed to be non-contributing to the character of the district and what effect, if any, its removal will have on the character of the Seven House District, arbitrarily, capriciously and totally disregarded

the testimony of Plaintiffs' witnesses Alvin Edelman and John Leahy and refused to permit such witnesses to provide relevant and material evidence.

l. The Findings of Fact made by the Commission are not supported by substantial evidence in the record. Many of the Commission's purported Findings of Fact are supported not by evidence in the record but are based upon statements contained in reports and recommendations of the Commission's staff which are neither in the record nor supported by any substantial evidence in the record.

m. The Commission's Decision is against the manifest weight of the evidence in that it ignores and disregards the uncontroverted substantial evidence presented by Plaintiffs that the Designation Ordinance is fatally flawed and, therefore, arbitrary and capricious in that it purports to include in a single landmark district seven single family buildings that are not contiguous and ancillary and accessory buildings such as garages and coach houses, and excludes from the district adjacent multiple family buildings that possess the same architectural, historical and sociological significance, if any, of the buildings included in the Seven House District.

n. The Commission's refusal to permit Plaintiffs to present evidence in support of their contention that the Designation Ordinance is arbitrary, capricious and unreasonable deprived Plaintiffs of their right to due process under the Constitution of the State of Illinois and the Constitution of the United States.

o. The Findings of Fact in the Decision, to the extent that they rely upon the evidence of Plaintiffs' expert witness Professor Carroll William Westfall, are contrary to the manifest weight of the evidence in that Professor Westfall testified that the portions of the structures proposed to be demolished by Plain-

tiffs were not critical features to the Seven House District, notwithstanding his opinion that said district was fatally flawed in its arbitrary inclusion of accessory buildings that should not have been designated and in its exclusion of other buildings that should have been included in the district.

p. The Decision of the Commission is arbitrary, capricious and illegal in that it applies as criteria in determining whether the demolition permits should be approved, criteria contained in its Rules and Regulations. Section 21-83 of the Landmark Ordinance expressly provides that the Commission's Decision on permit applications "shall contain the Findings of Fact that constitute the basis for the decision consistent with the criteria in Section 21-77." Notwithstanding the mandatory requirements of this section, the criteria, if any, found in Section 21-77 [were] not applied by the Commission.

q. The Commission's Decision is arbitrary, capricious and illegal in that it is predicated upon criteria contained in its Rules and Regulations which were neither authorized nor approved by the Landmark Ordinance.

r. The Commission's Decision is arbitrary, capricious and illegal in that the criteria applied by the Commission from its Rules and Regulations [are] unconstitutionally vague and indefinite.

s. The Decision is contrary to the manifest weight of the evidence and is not supported by substantial evidence.

t. The Commission failed to make legally sufficient Findings of Fact necessary to support its decision to disapprove the four demolition permits.

17. Pursuant to Section 3-108 of the Code of Civil Procedure, Plaintiffs demand that the entire transcript

of evidence taken at the public hearing on December 18, 1990, including all exhibits and the Commission's transcript and minutes of its meetings held on January 9, 1991, be filed by Defendant Commission as part of the record in this case.

WHEREFORE, Plaintiffs request that the Court:

1. Review the Decision of the Commission on Chicago Landmarks rendered on January 9, 1991, and the record of the public hearing held on December 18, 1990 culminating in the Decision;

2. Find and declare that the Landmark Ordinance is unconstitutional on its face;

3. Find and declare that the Landmark Ordinance and the Designation Ordinance as applied to the Subject Property are unconstitutional;

4. Find and declare that the Commission failed to consider Plaintiffs' application for demolition permits and proposed plan for redevelopment as required by the Landmark Ordinance and the Commission's Rules and Regulations, and as a result thereof the Commission's actions be declared illegal and that Plaintiffs be authorized to proceed with the demolition of the structures described in the demolition permits;

5. Find and declare that the Plaintiffs were denied due process and a fair and impartial hearing and consideration by the Commission; that the Commission's conduct demonstrates that the Plaintiffs are precluded from receiving a fair and impartial hearing and consideration by the Commission; that the Decision of the Commission is void; and that the provisions of the Designation Ordinance as they pertain to the Subject Property are void and of no force and effect;

6. Find and declare that the Decision be reversed and held for naught; and

7. That the Court grant such other and further relief which the Court deems lawful and proper.

Respectfully submitted,

INTERNATIONAL COLLEGE OF SURGEONS,
UNITED STATES SECTION OF THE
INTERNATIONAL COLLEGE OF SURGEONS,
and ROBIN CONSTRUCTION CORPORATION

By _____
One of its Attorneys

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EXHIBIT A

COMMISSION ON CHICAGO LANDMARKS
320 North Clark Street
Chicago, Illinois

THE FINDINGS AND DECISION OF THE COMMISSION ON CHICAGO LANDMARKS IN THE MATTER OF FOUR PERMIT APPLICATIONS TO DEMOLISH PORTIONS OF 1516 AND 1524 NORTH LAKE SHORE DRIVE.

BACKGROUND:

On October 10, 1990, the Commission on Chicago Landmarks received from the Department of Buildings of the City of Chicago four demolition permit applications filed on behalf of the International College of Surgeons. The applications proposed to demolish the rear portions and coach houses of 1516 and 1524 North Lake Shore Drive, properties located within the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, a designated Chicago Landmark.

The SEVEN HOUSES ON LAKE SHORE DRIVE District was designated a Chicago Landmark by the City Council of Chicago on June 28, 1989. Exercising the home rule authority of the City of Chicago under Article VII, Section 6 of the Illinois Constitution, the City Council of Chicago established the Commission on Chicago Landmarks by ordinance, Chapter 21, Sections 21-62 to 21-95 of the Municipal Code of Chicago, in 1968 and as amended in 1987, for these purposes:

1. To identify, preserve, protect, enhance, and encourage the continued utilization and the rehabilitation of such areas, districts, places, buildings, structures, works of art, and other objects having a special historical, community, architectural, or aesthetic interest or value to the City of Chicago and its citizens;

2. To safeguard the City of Chicago's historic and cultural heritage, as embodied and reflected in such areas, districts, places, buildings, structures, works of art, and other objects determined eligible for designation by ordinance as "Chicago Landmarks;"

3. To preserve the character and vitality of the neighborhoods and central area, to promote economic development through rehabilitation, and to conserve and improve the property tax base of the City of Chicago;

4. To foster civic pride in the beauty and noble accomplishments of the past as represented in such "Chicago Landmarks;"

5. To protect and enhance the attractiveness of the City of Chicago to homeowners, home buyers, tourists, visitors, businesses, and shoppers, and thereby to support and promote business, commerce, industry, and tourism, and to provide economic benefit to the City of Chicago;

6. To foster and encourage preservation, restoration, and rehabilitation of areas, districts, places, buildings, structures, works of art, and other objects, including entire districts and neighborhoods, and thereby prevent future urban blight and in some cases reverse urban deterioration;

7. To foster the education, pleasure, and welfare of the people of the City of Chicago through the designation of "Chicago Landmarks;"

8. To encourage orderly and efficient development that recognizes the special value to the City of Chicago of the protection of areas, districts, places, buildings, structures, works of art, and other objects designated as "Chicago Landmarks;"

9. To encourage the continuation of surveys and studies of Chicago's historical and architectural resources and the maintenance and updating of a register of areas, districts, places, buildings, structures, works of art, and other objects which may be worthy of landmark designation; and

10. To encourage public participation in identifying and preserving historical and architectural resources through public hearings on proposed designations, building permits, and economic hardship variations.

This ordinance requires in part that "no permit for . . . demolition . . . or other work shall be issued to any applicant by any department of the City of Chicago without the written approval of the Commission for any . . . district . . . which has been designated as a 'Chicago Landmark' . . . where such a permit would allow the demolition of any improvement which constitutes all or a part of a landmark. . . ." (Sec. 21-77). Further, "if the Commission finds that the proposed work will adversely affect or destroy any significant historical or architectural feature of the improvement or district or is inappropriate or inconsistent with the designation of the structure . . . or district or is not in accordance with the spirit or purposes of this ordinance or does not comply with the Standards for Rehabilitation established by the Secretary of the Interior, the Commission shall issue a preliminary decision disapproving the application for permit. . . ." (Sec. 21-81).

The Rules and Regulations of the Commission on Chicago Landmarks set forth the procedure and criteria to be considered by the Commission in determining the effect of proposed demolition work. The introduction to this section states in part that:

> Landmark districts are composed of many elements, the aggregate of which creates a distinctive environment. These elements include buildings, streetscapes, landscapes, auxiliary buildings, and other physical features which give the district its iden-

tity and constitute the basis for designation. Within any district, there may be a small number of buildings or other elements that do not contribute to the character of the district. The Commission will consider allowing the demolition of such non-contributing improvements within designated districts based on the following two conditions: 1) *the property proposed for demolition is deemed to be non-contributing to the character of the district, and its removal will not have a negative effect on the character of the district;* and 2) the proposed redevelopment of the property is reviewed and approved by the Commission. . . . (emphasis added) (Article IV, Sec. C).

This section identifies five criteria to be considered in evaluating whether a property contributes to the character of the district:

a) The subject property exhibits the critical features described in the designation ordinance.

b) The subject property respects the general site characteristics associated with the district.

c) The subject property respects the general size, shape, and scale associated with the district.

d) The subject property respects the general historic and architectural characteristics associated with the district.

e) The materials of the subject property are compatible with the district in general character, color, and texture.

On October 23, 1990, the Commission, by applying the provisions of the landmark ordinance and its *Rules and Regulations*, found that the properties in question do contribute to the character of the district and that the proposed demolition would adversely affect or destroy a significant historical and architectural feature of the improvement and district, and, therefore, issued a preliminary decision disapproving the applications for demolition permits.

Subsequently, as provided in Section 21-82, an informal conference with the applicant was held on November 6, 1990, "for the purpose of securing compromise regarding the proposed work so that the work will not in the opinion of the Commission adversely affect any significant historical or architectural feature." No compromise was forthcoming. Consequently, the Commission scheduled a public hearing (per Section 21-83) on the four demolition permit applications for portions of 1516 and 1524 North Lake Shore Drive.

This public hearing was held on December 18, 1990. The purpose of the hearing as set forth by the hearing officer, Mr. Peter Bynoe, Chairman of the Commission, was to take statements and testimony relevant to the effects of the proposed demolition at 1516 and 1524 North Lake Shore Drive on the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT in accordance with the above-cited criteria for determining whether the properties contribute to the character of the district. Statements and testimony were limited to the question of whether or not the properties proposed for demolition contribute to the character of the district and what effect, if any, their removal will have on the district's character.

Within 30 days of the completion of this hearing the Commission is required by Section 21-83 to issue its decision in writing including "findings of fact that constitute the basis for the decision consistent with the criteria in Section 21-77" of the landmark ordinance.

SUMMARY OF PUBLIC HEARING:

There were no statements given in support of the applications for demolition by the public present.

There were forty-one statements given in opposition to the applications for demolition by the public present.

The applicant, through their attorneys, Mr. Daniel Houlihan and Mr. Richard Brennan, presented three witnesses:

> Mr. Alvin Edelman, attorney and agent for the International College of Surgeons;
>
> Mr. John Lahey, architect, Solomon Cordwell & Buenz;
>
> Dr. Carroll William Westfall, Professor of Architectural History, University of Virginia.

The Commission notes that neither Mr. Adelman nor Mr. Lahey presented testimony directed toward the question before the public hearing; i.e., whether or not the properties proposed for demolition contribute to the character of the district and what effect, if any, their removal will have on the character of the district.

Dr Westfall, in response to a question from the applicant, stated that it was his view that those portions of the property proposed for demolition would not effect critical features of 1516 and 1524 North Lake Shore Drive because they should not be considered critical features. He gave five reasons for his opinion:

> 1. The portions to be demolished are not visible from the public way.
>
> 2. The portions to be demolished are ancillary structures, coach houses, housing service functions and accommodating servants.
>
> 3. The portions to be demolished exhibit designs, materials and details that are less high style than the Lake Shore Drive fronts of these properties.
>
> 4. The district designation is flawed because it includes service buildings but excludes contemporaneous high-rise apartment buildings.
>
> 5. The inclusion of the adjacent older high-rises, and more realistically, all the North Lake Shore Drive structures predating 1930, would make the portions proposed for demolition "very subordinate, unimportant service structures. . . ."

Under cross examination by the hearing officer:

> Q. In your opinion, do those coach houses contribute to the character of the district?
>
> A. The coach houses contribute to the character of the district as designated by this ordinance.
>
> Q. From an historical perspective . . . would there have been any reason for these coach houses to have been built but for the houses on the front . . . of Lake Shore Drive.
>
> A. No.
>
> Q. From an historic point of view, then, is there clearly a linkage between the coach houses and the buildings which they serve?
>
> A. Yes.
>
> Q. Are these buildings architecturally inconsistent with the buildings on Lake Shore Drive. . .?
>
> A. No, they are architecturally consistent within the framework of the classical system within which they were built.

Later examination by Mr. Thomas Z. Hayward, attorney representing the 1500 North Lake Shore Drive Building Association, a party to the proceedings:

> Q. . . . . doesn't the two structures that we are talking about, the courtyards, the entire entourage depict a way of life, a design that is not preserved anywhere else along Lake Shore Drive other than in the seven houses that comprise this district?
>
> A. That's the only place that is preserved.

Two witnesses offered expert testimony in opposition to the proposed demolitions:

Mr. Dennis McFadden, Historic Preservation Consultant.

Mr. Howard Decker, architect, Kemp and Decker.

Mr. McFadden's testimony examined the questions of whether or not the property proposed for demolition contributed to the character of the district and what the effect of its removal would be on the district's character, addressing the criteria found in the Commission's *Rules and Regulations*, Article III, Section C. It was the conclusion of the witness that each property met the five criteria used to substantiate their contribution to the character of the district, and in four of the five criteria the property not only respected but also defined the characteristics which are considered critical features of this district.

He stated that the proposed demolition would compromise the design of each structure because each was a three-dimensional design, main house and coach house, composed on the site, and dependent upon one another for meaning. He noted that the properties are visible from points other than Lake Shore Drive. From the public alley the coach houses and rear elevations of the main houses are readily viewable and the variation in design, material, and detail from front to rear are critical features to the understanding of the architectural and social milieu of the district.

In his testimony, Mr. Decker stated that demolition of portions of the rear of 1516 and 1524 and the coach houses would have an adverse effect from three perspectives:

1. The story these sites can tell about our social and cultural life would be compromised, their historic significance lost.

2. These properties represent the work of one of the most important architectural practices (McKim, Meade and White) and one of the most important

individual architects (Howard Van Doren Shaw), and therefore important architectural works would be destroyed.

3. The meaning of architecture, as embodied in this site the hierarchy of its functional and social relationship and as expressed in an integrated design, would no longer be understandable.

FINDINGS OF FACT:

The Commission finds that the demolition proposed for 1516 and 1524 North Lake Shore Drive will effect improvements which constitute part of the landmark and that this effect will be an adverse one, destroying significant historical and architectural features of the district inconsistent with the intent of [the] designation and not in accordance with the spirit and purposes of the landmark ordinance.

Approval of demolition proposals within landmark districts requires that the Commission determine that "the property proposed for demolition is deemed to be non-contributing to the character of the district, and its removal will not have a negative effect on the character of the district." (*Rules*, Article IV, Sec. C). The Commission deems the property proposed for demolition contributes to the character of the district and that its removal will have a negative effect on the character of the district based on consideration of the following five criteria:

a) The Commission finds that the property proposed for demolition exhibits the critical features described in the designation ordinance. The designation ordinance states that: "In the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, the critical features that make an essential contribution to the qualities and characteristics by which the district meets six of the seven criteria for landmark designation are all the exterior faces of all the structures and all the streetscapes within the boundaries."

b) The Commission finds that the property respects the general site characteristics associated with the district. All three properties that compose this north segment of the district retain their original site configuration: front lawn, main house, carriage drive, rear courtyard, and coach house.

Mr. Westfall, the applicant's witness, under cross examination acknowledges that, within the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, only here is this illustrative site plan preserved on Lake Shore Drive. He also notes that from a historical point of view there is a clear link between the coach houses and the buildings which they serve.

Mr. McFadden, in his testimony, states that "more than respect these criteria [*Rules*, Article IV, Sec. C, (b)-(e)], the properties at 1516 and 1524 North Lake Shore Drive help define [them]. . . . The loss of these features will compromise the designs of these structures. Each property was designed in its entirety by the architect of record. . . . Each component was a three-dimensional design, and the individual components . . . were composed on the site. . . . By diminishing their physical integrity, the demolition of portions of 1516 and 1524 North Lake Shore Drive properties will reduce to fragments intact artifacts that contribute meaningfully to our understanding of the architectural and social stories told by this district.

Mr. Decker, in his testimony, states that "the demolition of the carriage houses and the rear portions of these buildings would compromise the ability of these structures to provide a cultural and interpretive contribution to the City of Chicago, which is to say without the elements which are now being proposed for demolition, the story that this site—these sites can tell about the history and growth of the social and cultural life of our city is compromised. . . . It's possible for you to . . . understand by virtue of walking

around the site the story that the relationship between these two buildings [main house and coach house] has to tell you about the life that was lived in them and about the architectural character that they both—that is theirs. . . . the integrity of the design arises out of the combination of the main house and service building, accessory building."

c) The Commission finds that the property respects the general size, shape, and scale associated with the district. The SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT is composed of seven, originally single-family, residential structures, three of which have attendant coach houses. All of these structures are similar in size, shape, and scale, and it is these similarities that are the foundation and common thread of the district designation. The designation ordinance notes: "The SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT has value as an example of the architectural and social heritage of . . . Chicago as the houses portray the character of North Lake Shore Drive as it was originally conceived and developed by the city's elite." Mr. Westfall notes that the principal of these "elite," Potter Palmer, initially fought the encroachment of larger scaled apartment buildings which would forever alter the character of his lakefront drive of single-family mansions. The designation also notes that "the scale, height, size, lot coverage, and bulk of all of the structures [of the district] . . . are established and familiar visual features. . . ."

d) The Commission finds that the property respects the general historic and architectural characteristics associated with the district. The seven properties which comprise the district embody the architecture, culture, economy, history, and society of Chicago's upper classes during the two decades immediately before and after 1900. Designed by preeminent architects (McKim Meade and White, and Howard Van Doren Shaw), in the fashionable revival styles of the day (renaissance revival) these large single-family

mansions with auxillary buildings, requiring large staffs, bespeak the wealth and social position of their prominent occupants.

Mr. Decker, in his testimony, states that these structures exemplify a way of life "characterized by monumental scale, persons of great wealth who were significant to our city's life in many different ways. And, that life was also characterized by the service buildings at the rear." In developing this point, he discusses the hierarchy of the arrangement of these buildings [front and rear] and states that "it's important . . . not to confuse the presence of architectural hierarchy on the site with its architectural significance. The extent to which a building sits at the rear of a site is not to necesarily conclude that it's not important and significant in the overall composition of the design for the site . . . . it's unreasonable to conclude that because [coach houses] are less significantly treated with respect to ornament and materials, they are less significant to our ability to understand their importance, their design, their architecture, who did them, their cultural value, and so on."

e) The Commission finds that the materials of the property are compatible with the district in general character, color, and texture. As noted in d) above, the seven properties of the district exemplify the fashionable architecture of their day. Their construction employed the best available materials and craftsmen.

Mr. Westfall notes the distinction between architectural and material treatments from front to rear. After discussing the Lake Shore Drive facades of the two structures which are crafted in limestone and richly ornamented, he notes that "when you go to the side of the building you see a distinct difference between [the front], which is the finished part of the building, and these parts which are—what can be called the diluted version of the same thing. . . . Where stone is used in front, brick is used in the back.

When stone is carved in the front, stone is left uncarved in the back. In other words, the original design made a distinction between this. Now, this is absolutely characteristic of everything that belongs in classical architecture, running back to the earliest architectural treatises and architectural theories about this sort of thing. . . ." In response to the hearing officer's question regarding whether these buildings (the coach houses) were architecturally inconsistent with the buildings on Lake Shore Drive, Mr Westfall: "No they are architecturally consistent within the framework of the classical system within which they were built."

The Commission finds that the preponderance of testimony received at the public hearing on the applications to demolish portions of 1516 and 1524 North Lake Shore Drive supports the conclusion that those portions of the main houses and the coach houses proposed for demolition significantly contribute to the character of the district, and their removal will have a negative effect on the character of the district. The applicant's only witness whose testimony addressed any of the issues under consideration at the public hearing concurred with this conclusion, upon cross examination, when asked: "Do those coach houses contribute to the character of the district?" Mr. Westfall answered: "The coach houses contribute to the character of the district as designated by this ordinance."

DECISION OF THE COMMISSION

The Commission on Chicago Landmarks finds that the properties proposed for demolition contribute to the character of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, and that the proposed demolitions will adversely affect and destroy significant historical and architectural features of the improvements and district, the destruction of which would be inappropriate and inconsistent with the designation of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT and would not be in accord

with the spirit or purposes of this landmark ordinance. Therefore, the Commission on Chicago Landmarks disapproves the four permits to demolish portions of the properties located at 1516 and 1524 North Lake Shore Drive. This decision is the Commission's final decision on these permit applications submitted for review on behalf of the International College of Surgeons, October 10, 1990.

PETER C. B. BYNOE, Chairman

Date

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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CCDCH - 60

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

INTERNATIONAL COLLEGE OF SURGEONS, et al.,
Plaintiffs
v.
THE CITY OF CHICAGO, et al.,
Defendants

NO. .....

REGISTERED
ac
FEB 25 1991

AURELIA PUCINSKI
Clerk of the Circuit Court

91L03363

SUMMONS IN ADMINISTRATIVE REVIEW

To each defendant:

YOU ARE SUMMONED and required to file an answer in this case or otherwise file your appearance in the office of the clerk of this court located in Room 802, Richard J. Daley Center, Chicago, Illinois, within 35 days after the date of this summons.

WITNESS: FEB 13 1991, 19.....

Aurelia Pucinski
Clerk of Court

Name	Richard J. Brennan	Daniel L. Houlihan
Attorney for	WINSTON & STRAWN Plaintiffs	DANIEL L. HOULIHAN & ASSOCIATES, LTD. Attorney for Plaintiffs
Address	35 W. Wacker	111 W. Washington, Suite 1631
City	Chicago, IL 60601	Chicago, IL 60602
Telephone	(312) 558-5600	(312) 372-6255
Atty No.	90875	

CERTIFICATE OF MAILING

On.....,19..., I sent by registered mail a copy of this summons to each defendant addressed as follows:

Defendant	Address
The City of Chicago	Walter S. Kozubowski, City Clerk, Rm. 107 121 N. LaSalle St., Chicago, IL 60602
Commission on Chicago Landmarks	William M. McLenahan, Director, Rm. 516 320 N. Clark St., Chicago, IL 60610
Peter C.B. Bynoe, Chairman	Commission on Chicago Landmarks, Rm. 516 320 N. Clark St., Chicago, IL 60610
Irving J. Markin, Vice-Chairman	Commission on Chicago Landmarks, Rm. 516 320 N. Clark St., Chicago, IL 60610
Thomas E. Gray, Secretary	Commission on Chicago Landmarks, Rm. 516 320 N. Clark St., Chicago, IL 60610
John W. Baird	Commission on Chicago Landmarks, Rm. 516 320 N. Clark St., Chicago, IL 60610
Josue Gonzalez	Commission on Chicago Landmarks, Rm. 516 320 N. Clark St., Chicago, IL 60610

Dated FEB 13 1991, 19...

Aurelia Pucinski
Clerk of Court

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

51

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CCDCH - 60

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

INTERNATIONAL COLLEGE OF SURGEONS, et al,
Plaintiffs
v.
THE CITY OF CHICAGO, et al,
Defendants

NO. .....

SUMMONS IN ADMINISTRATIVE REVIEW

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WITNESS: .....,19.....

.....
Clerk of Court

Name	Richard J. Brennan	Daniel L. Houlihan
Attorney for	WINSTON & STRAWN Plaintiffs	DANIEL L. HOULIHAN & ASSOCIATES, LTD. Attorney for Plaintiffs
Address	35 W. Wacker	111 W. Washington, Suite 1631
City	Chicago, IL 60601	Chicago, IL 60602
Telephone	(312) 558-5600	(312) 372-6255
Atty No.	90875	

CERTIFICATE OF MAILING

On.....,19..., I sent by registered mail a copy of this summons to each defendant addressed as follows:

Defendant	Address
Amy R. Hecker	Commission on Chicago Landmarks, Rm.516 320 N. Clark St. Chicago, IL 60610
David R. Mosena	Commission on Chicago Landmarks, Rm.516 320 N. Clark St. Chicago, IL 60610
Charles Smith	Commission on Chicago Landmarks, Rm.516 320 N. Clark St. Chicago, IL 60610
1500 Lake Shore Drive Building Corporation	Theodore Johnson, Reg. Agent, 875 N. Michigan Ave. Chicago, IL 60611
The North State, Astor, Lake Shore Drive Association	Mary Clare Starshak, Reg. Agent, 1335 N. Astor St. Chicago, IL 60610
Marian Despres	Commission on Chicago Landmarks, Rm.516 320 N. Clark St. Chicago, IL 60610
.....	.....

Dated.....,19.....

.....
Clerk of Court

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

52

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CCDCH - 60

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

INTERNATIONAL COLLEGE OF SURGEONS, et al,

Plaintiffs

v.

THE CITY OF CHICAGO, et al,

Defendants

NO. .....

SUMMONS IN ADMINISTRATIVE REVIEW

To each defendant:

YOU ARE SUMMONED and required to file an answer in this case or otherwise file your appearance in the office of the clerk of this court located in Room 802, Richard J. Daley Center, Chicago, Illinois, within 35 days after the date of this summons.

WITNESS: .....,19.....

.....
Clerk of Court

Name	Richard J. Brennan WINSTON & STRAWN	Daniel L. Houlihan DANIEL L. HOULIHAN & ASSOCIATES, LTD.
Attorney for	Plaintiffs	Attorney for Plaintiffs
Address	35 W. Wacker	111 W. Washington, Suite 1631
City	Chicago, IL 60601	Chicago, IL 60602
Telephone	(312) 558-5600	(312) 372-6255
Atty No.	90875	

CERTIFICATE OF MAILING

On.....,19...., I sent by registered mail a copy of this summons to each defendant addressed as follows:

Defendant	Address
Daniel Weil, Building Commissioner	City of Chicago Room 900 121 N. LaSalle Chicago, IL 60602
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

Dated.....,19.....

.....
Clerk of Court

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

(Captioned Omitted)

AFFIDAVIT PURSUANT TO § 3-105 OF THE ILLINOIS CODE OF CIVIL PROCEDURE

I, Teri Lee Ferro, being an attorney and duly sworn, deposes that I am familiar with the addresses of each of the defendants in the above-captioned matter to be as listed below and that such addresses are correct as to the best of my knowledge.

The City of Chicago
Walter S. Kozubowski,
City Clerk, Room 107
121 N. LaSalle Street
Chicago, Illinois 60602

Peter C.B. Bynoe, Chairman
Commission on Chicago
Landmarks
Room 516
320 N. Clark Street
Chicago, Illinois 60610

Thomas E. Gray, Secretary
Commission on Chicago
Landmarks
Room 516
320 N. Clark Street
Chicago, Illinois 60610

Commission on Chicago
Landmarks
William M. McLenahan,
Director
Room 516
320 N. Clark Street
Chicago, Illinois 60610

Irving J. Markin,
Vice-Chairman
Commission on Chicago
Landmarks
Room 516
320 N. Clark Street
Chicago, Illinois 60610

John W. Baird
Commission on Chicago
Landmarks
Room 516
320 N. Clark Street
Chicago, Illinois 60610

Josue Gonzalez
Commission on Chicago Landmarks
Room 516
320 N. Clark Street
Chicago, Illinois 60610

David R. Mosena
Commission on Chicago Landmarks
Room 516
320 N. Clark Street
Chicago, Illinois 60610

Marian Despres
Commission on Chicago Landmarks
Room 516
320 N. Clark Street
Chicago, Illinois 60610

The North State, Astor, Lake Shore Drive Association
Mary Clare Starshak, Reg. Agent
1335 N. Astor Street
Chicago, Illinois 60610

Amy R. Hecker
Commission on Chicago Landmarks
Room 516
320 N. Clark Street
Chicago, Illinois 60610

Charles Smith
Commission on Chicago Landmarks
Room 516
320 N. Clark Street
Chicago, Illinois 60610

1500 Lake Shore Drive Building Corporation
Theodore Johnson, Reg. Agent
875 N. Michigan Avenue
Chicago, Illinois 60611

Daniel Weil
Building Commissioner
City of Chicago
Room 900
121 N. LaSalle Street
Chicago, Illinois 60602

/s/ Teri Lee Ferro
TERI LEE FERRO

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 5564

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation and UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,

Plaintiffs,

v.

THE CITY OF CHICAGO, a municipal corporation, and its COMMISSION ON CHICAGO LANDMARKS, ITS COMMISSIONERS PETER C.B. BYNOE, Chairman, IRVING J. MARKIN, Vice-Chairman, THOMAS E. GRAY, Secretary, JOHN W. BAIRD, JOSUE GONZALES, AMY R. HECKER, DAVID R. MOSENA, MARIAN DESPRES and CHARLES SMITH, and DANIEL W. WEIL, Commissioner of Department of Buildings of the City of Chicago, 1500 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, and THE NORTH STATE, ASTOR, LAKE SHORE DRIVE ASSOCIATION, a not-for-profit corporation, and 1448 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation,

Defendants.

NOTICE OF FILING

PLEASE TAKE NOTICE that on September 5, 1991, I filed with the Clerk of the above Court Defendants City of Chicago, Commission on Chicago Landmarks, Peter C.

B. Bynoe, Irving J. Markin, Thomas E. Gray, John W. Baird, Josue Gonzales, Amy R. Hecker, David R. Mosena, Marian Despres, Charles Smith, and Daniel W. Weil, The 1500 Lakeshore Drive Building Corporation, The 1448 Lakeshore Drive Building Corporation, and The North State, Astor, Lake Shore Drive Associations' Appearance and Notice of Removal, copies of which are attached hereto and hereby served upon you.

KELLY R. WELSH
Corporation Counsel of the
City of Chicago

By:/s/ Sheila A. Owens
SHEILA A. OWENS
Assistant Corporation Counsel

SUSAN R. LICHTENSTEIN
Deputy Corporation Counsel
RUTH MOSCOVITCH
Chief Assistant Corporation Counsel
SHEILA OWENS
Assistant Corporation Counsel
Suite 704
180 North LaSalle Street
Chicago, Illinois 60601
(312) 744-0459/7724/2567

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted)

NOTICE OF REMOVAL

To the Judges of the United States District Court for the Northern District of Illinois:

Defendants City of Chicago ("City"), Commission on Chicago Landmarks ("Commission"), Peter C. B. Bynoe, Irving J. Markin, Thomas E. Gray, John W. Baird, Josue Gonzales, Amy R. Hecker, David R. Mosena, Marian Despres, Charles Smith, and Daniel W. Weil (Collectively, "City Defendants"), The 1500 Lake Shore Drive Building Corporation, 1448 Lake Shore Drive Building Corporation, and The North State, Astor, Lake Shore Drive Association (Collectively, "Interested Parties") hereby remove the above-entitled action pursuant to 28 U.S.C. section 1441(b). No appearance or motion is made for unnamed or unserved parties. In support of their removal, the City Defendants state:

1. The City Defendants are defendants in a civil action commenced on August 7, 1991, in the Circuit Court of Cook County of the State of Illinois, No. 91 CH 7289, styled *INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation and UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation v. THE CITY OF CHICAGO, a municipal corporation, and its COMMISSION ON CHICAGO LAND-*

MARKS, ITS COMMISSIONERS, PETER C. B. BYNOE, Chairman, IRVING J. MARKIN, Vice-Chairman, THOMAS E. GRAY, Secretary, JOHN W. BAIRD, JOSUE GONZALES, AMY R. HECKER, DAVID R. MOSENA, MARIAN DESPRES and CHARLES SMITH, and DANIEL W. WEIL, Commissioner of Department of Buildings of the City of Chicago, 1500 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, and THE NORTH STATE, ASTOR, LAKE SHORE DRIVE ASSOCIATION, a not-for-profit corporation and 1448 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation. A copy of the complaint and summons, and an affidavit filed pursuant to § 3-105 of the Illinois Code of Civil Procedure in the proceeding are attached hereto.

2. The action alleges that the Landmark Ordinance of the City of Chicago violates the United States Constitution and that certain actions of defendant Commission violated plaintiffs' rights under the United States Constitution. Plaintiffs request that the Court find the Landmark Ordinance unconstitutional on its face and as applied to the property that is the subject of the action. The specific allegations in which plaintiffs raise issues under federal law are paraphrased below.

a. Plaintiffs allege that the Landmark Ordinance is unconstitutional and invalid on its face in violation of the Fourteenth Amendment of the United States Constitution because it effects a deprivation of life, liberty or property without due process of law; a denial of equal protection of the laws; a taking without just compensation; confiscatory special legislation; and a denial of plaintiffs' development expectations.

Complaint, ¶ 23(a)(b)(c)(k)(m).

b. Plaintiffs allege that the Landmark Ordinance is unconstitutional and invalid on its face in violation of

the Fifth Amendment of the United States Constitution because it effects a taking of property and a denial of plaintiffs' development plans without just compensation and special confiscatory legislation.

Complaint, ¶ 23(c)(m).

c. The Landmark Ordinance is unconstitutional and invalid as applied to these plaintiffs in violation of the Fourteenth and Fifth Amendments to the United States Constitution in that it effects a deprivation of property without due process of law; a deprivation of equal protection of the laws; a taking without just compensation; and a denial of plaintiffs' development plans.

Complaint ¶ 23(f)(g)(m).

3. This Court has original jurisdiction to hear suits to redress violations of rights guaranteed by the United States Constitution pursuant to 28 U.S.C. Sections 1331 and 1343. Defendants are entitled to remove this action pursuant to the provisions of 28 U.S.C. Section 1441(b), because plaintiffs' Complaint appears on its face to arise under the United States Constitution, and to involve a federal question.

4. All defendants in this proceeding, including the interested parties, have consented to the removal of this suit to federal court.

WHEREFORE, Defendants request that the above-described action now pending in the Circuit Court of Cook County be removed to this Court.

Respectfully submitted,

KELLY R. WELSH
Corporation Counsel of the
City of Chicago

By: /s/ Sheila A. Owens
SHEILA A. OWENS
Assistant Corporation Counsel
Attorney for the City of Chicago, a municipal corporation, and its Commission on Chicago Landmarks, its Commissioners Peter C. B. Bynoe, Chairman, Irving J. Markin, Vice-Chairman, Thomas E. Gray Secretary, John W. Baird, Josue Gonzales, Amy R. Hecker, David R. Mosena, Marian Despres and Charles Smith, and Daniel W. Weil, Commissioner of Department of Buildings of the City of Chicago

By: /s/ Brian Martin
BRIAN MARTIN
Bell, Boyd & Lloyd
Attorneys for 1500 Lake Shore Drive Building Corporation and 1448 Lake Shore Drive Building Corporation

By: /s/ Thomas J. Murphy
THOMAS J. MURPHY
Attorney for North State, Astor, Lake Shore Drive Building Corporation

SUSAN R. LICHTENSTEIN
Deputy Corporation Counsel
RUTH MOSCOVITCH
Chief Assistant Corporation Counsel
SHEILA OWENS
Assistant Corporation Counsel
Suite 704
180 North LaSalle Street
Chicago, Illinois 60601
(312) 744-0459/7724/2567

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted)

AFFIDAVIT

SHEILA A. OWENS, being duly sworn on oath, deposes and states that she is one of the attorneys for Petitioners in the above-entitled action; that on the 3rd day of September, 1991, [s]he caused to be filed with the Clerk of the Circuit Court of Cook County, Illinois, a copy of Petitioner's Notice of Removal together with a copy of the original Complaint in the action by leaving said copies with the Clerk of the Court, Chancery Division, Room 802, Daley Center, Chicago, Illinois.

/s/ Sheila A. Owens
SHEILA A. OWENS

[Jurat and Certificate Omitted]

~~2129~~ - Served
2229 - Not Served
2329 - Served By Mail

(4-81) CCL-40

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

INTERNATIONAL COLLEGE OF SURGEONS, et al.,

Plaintiffs,

v.

THE CITY OF CHICAGO, et al.

Defendants.

NO. .....

SUMMONS IN ADMINISTRATIVE REVIEW

To each defendant:

YOU ARE SUMMONED and required to file an answer in this case or otherwise file your appearance in the office of the clerk of this court located in Room 801, Richard J. Daley Center, Chicago, Illinois, within 35 days after the date of this summons.

WITNESS:.....19....

.....
Clerk of Court

Richard J. Brennan/Daniel L. Houlihan
Name WINSTON & STRAWN/DANIEL L. HOULIHAN & ASSOCIATES, LTD.
Attorney for Plaintiffs
Address 35 West Wacker Drive/111 W. Washington Street
City Chicago, IL 60601/Chicago, IL 60602
Telephone 312/558-5600/312-372-6255
Atty No. 90875/20308

CERTIFICATE OF MAILING

On .....19...., I sent by registered mail a copy of this summons to each defendant addressed as follows:

Defendant	Address
The City of Chicago	Walter S. Kozubowski, City Clerk, Rm 10 121 N. LaSalle St., Chicago, IL 60602
Commission on Chicago Landmarks	William M. McLenahan, Director, Rm. 516 320 N. Clark St., Chicago, IL 60610
Peter C.B. Bynoe, Chairman	Commission on Chicago Landmarks, Rm. 51 320 N. Clark St., Chicago, IL 60610
Irving J. Markin, Vice-Chairman	Commission on Chicago Landmarks, Rm. 51 320 N. Clark St., Chicago, IL 60610
Thomas E. Gray, Secretary	Commission on Chicago Landmarks 320 N. Clark St. Chicago, IL 60610
John W. Baird	Commission on Chicago Landmarks 320 N. Clark St. Chicago, IL 60610
Josue Gonzalez	Commission on Chicago Landmarks 320 N. Clark St., Chicago, IL 60610
Amy R. Hecker	Commission on Chicago Landmarks 320 N. Clark St., Chicago, IL 60610

Dated .....19....

.....
Clerk of Court

MORGAN M. FINLEY, CLERK IF THE CIRCUIT COURT OF COOK COUNTY

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

No. 91 CH 7289

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,

Plaintiffs,

v.

THE CITY OF CHICAGO, a municipal corporation, and its COMMISSION ON CHICAGO LANDMARKS, ITS COMMISSIONERS, PETER C.B. BYNOE, Chairman, IRVING J. MARKIN, Vice-Chairman, THOMAS E. GRAY, Secretary, JOHN W. BAIRD, JOSUE GONZALES, AMY R. HECKER, DAVID R. MOSENA, MARIAN DESPRES, CHARLES THUROW and CHARLES SMITH, and DANIEL W. WEIL, Commissioner of Department of Buildings of the City of Chicago, 1500 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, 1448 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, and THE NORTH STATE, ASTOR, LAKE SHORE DRIVE ASSOCIATION, a not-for-profit corporation,

Defendants.

COMPLAINT FOR ADMINISTRATIVE REVIEW

Plaintiffs, INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, and ROBIN

CONSTRUCTION CORPORATION, a for-profit corporation, by their attorneys DANIEL L. HOULIHAN, DANIEL L. HOULIHAN & ASSOCIATES, LTD., and RICHARD J. BRENNAN and TERI LEE FERRO, WINSTON & STRAWN, complain against THE CITY OF CHICAGO, a municipal corporation, and its Administrative Agency, the COMMISSION ON CHICAGO LANDMARKS, and ITS COMMISSIONERS, PETER C.B. BYNOE, Chairman, IRVING J. MARKIN, Vice-Chairman, THOMAS E. GRAY, Secretary, JOHN W. BAIRD, JOSUE GONZALES, AMY R. HECKER, DAVID R. MOSENA, MARIAN DESPRES, and CHARLES SMITH, and DANIEL W. WEIL, Commisioner of Department of Buildings of the City of Chicago, 1500 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, 1448 LAKE SHORE DRIVE BUILDING CORPORATION, a for-profit corporation, and THE NORTH STATE, ASTOR, LAKE SHORE DRIVE ASSOCIATION, a not-for-profit corporation, defendants, and allege as follows:

1. Plaintiff, International College of Surgeons is a not-for-profit corporation organized and existing under the laws of the District of Columbia, and Plaintiff, United States Section of the International College of Surgeons is a not-for-profit corporation organized and existing under the laws of the District of Columbia, said Plaintiffs are collectively referred to herein as "the College." The College maintains its principal offices in Chicago, Illinois.

2. Robin Construction Corporation ("Robin") is a corporation licensed and authorized to do business in the State of Illinois, engaged in the real estate development business including the development and the construction of buildings used as multiple family dwellings. By virtue of certain contracts, Robin is a contract purchaser and principal developer of the Subject Property described in paragraph 9 hereof.

3. Defendant, The City of Chicago, is a municipal corporation organized and operating pursuant to the laws of Illinois in the County of Cook, which by an ordinance adopted by the City Council of Chicago on March 11, 1987, hereinafter referred to as the "Landmarks Ordinance" (Municipal Code of Chicago, Chapter 21, Sections 21-62 through 21-95), created and constituted the defendant the Commission on Chicago Landmarks (the "Commission") as an administrative agency authorized to make final decisions within the meaning of the Administrative Review Act (Ill.Rev.Stat. 1990, Ch. 110, ¶¶ 3-101, *et seq.*).

4. Defendant, Peter C.B. Bynoe, is the Chairman of the Commission, and the defendants, Irving J. Markin, Thomas E. Gray, John W. Baird, Josue Gonzales, Amy R. Hecker, David R. Mosena, Marian Despres, Charles Thurow and Charles Smith, are all of the other Commissioners of the Commission, all of whom acted together as the Commission.

5. Defendant, Daniel W. Weil, is the Commissioner of Department of Buildings of the City of Chicago, and is designated by the Municipal Code of Chicago as the official responsible for the issuance of demolition and building permits.

6. Defendant, 1500 Lake Shore Drive Building Corporation, is a for-profit corporation organized and existing under the laws of the State of Illinois, which was granted "Party Status" by the Commission at a public hearing on March 5, 1991, concerning the application for an economic hardship exception which is the subject of this proceeding.

7. Defendant, 1448 Lake Shore Drive Building Corporation, is a for-profit corporation organized and existing under the laws of the State of Illinois, which was granted "Party Status" by the Commission at a public hearing on March 5, 1991, concerning the Application for an eco-

nomic hardship exception which is the subject of this proceeding.

8. Defendant, The North State, Astor, Lake Shore Drive Association, is a not-for-profit corporation organized and existing under the laws of the State of Illinois, which was granted "Party Status" by the Commission at a public hearing on March 15, 1991, concerning the Application for economic hardship exception which is the subject of this proceeding. The Defendants granted Party Status are collectively referred to herein as "Interested Parties."

9. Plaintiffs, the College, are the owners, as tenants-in-common, of two parcels of real estate situated in the City of Chicago commonly known as 1516-1524 North Lake Shore Drive, Chicago, Cook County, Illinois (the "Subject Property"). The Subject Property is improved with two buildings which the College has owned for more than 40 years, and in which the College operates its administrative headquarters and a public museum, the International Museum of Surgical Science and Hall of Fame ("Museum").

10. After months of negotiations, in February 1989, the College entered into a contract for the sale and redevelopment of the Subject Property (the "Contract") pursuant to which the College will receive a purchase price of $17 million, subject to certain adjustments.

11. On June 28, 1989, the City Council of the City of Chicago, pursuant to the recommendation of the defendant Commission, enacted a designation ordinance known as "The Seven Houses on Lake Shore Drive District Ordinance" (the "Designation Ordinance") wherein it designated the Subject Property and five other parcels as a Landmark District, referred to herein as the "Seven House District." Such action was taken pursuant to the Landmarks Ordinance. The inclusion of the Subject Property within the Seven House District was made over the objection of the College.

12. On or about October 5, 1990, Plaintiffs caused to be filed with the City of Chicago, Department of Buildings, four demolition permit applications, which applications sought permits for the demolition of certain portions of the rear of the two main buildings and the coach houses now existing on the Subject Property as part of Plaintiffs' redevelopment plan for the Subject Property. Pursuant to the provisions of the Landmarks Ordinance, the Department of Buildings referred the demolition applications to the Commission on October 10, 1990.

13. On October 23, 1990, the Commission pursuant to Section 21-79 of the Landmarks Ordinance, made a preliminary decision that the demolition of portions of the subject buildings would adversely affect or destroy a significant historical and architectural feature of the improvements in the Seven House District, and issued its preliminary decision disapproving the applications for demolition permits.

14. On November 6, 1990, pursuant to Plaintiffs' request under Section 21-82 of the Landmarks Ordinance, the Commission held an informal conference with Plaintiffs. At the informal conference, the Commission ruled that Plaintiffs' plans for the redevelopment of the Subject Property were not material to its consideration of the demolition permits and that it would not consider any evidence pertaining to the redevelopment. As a result of the Commission's refusal to consider or review Plaintiffs' proposed redevelopment plan, the Commission and Plaintiffs were unable to reach an accord as provided for in Section 21-82 at the informal conference or at any time thereafter.

15. On December 18, 1990, a public hearing was held pursuant to Section 21-83 of the Landmarks Ordinance at which Plaintiffs offered evidence to prove that Plaintiffs' redevelopment plan, including the demolition permits, should be approved and issued.

16. On January 9, 1991, the Commission rendered a final administrative decision disapproving Plaintiffs' Applications for four demolition permits.

17. Thereafter, Plaintiffs filed their Complaint for Administrative Review in the Circuit Court of Cook County, Illinois in a cause entitled, "International College of Surgeons et al. v. The City of Chicago, et al.", No. 91 CH 1361, which cause was removed by the defendants to the United States District Court for the Northern District of Illinois, Eastern Division, as Cause No. 90 C 1587, where said cause is pending, subject to that Court's ruling on the Plaintiffs' Motion to Remand the cause to the Circuit Court of Cook County.

18. The Landmarks Ordinance provides an owner whose permit application has been denied the opportunity to apply to the Commission for an economic hardship exception. The Ordinance specifically provides as follows:

> Upon final notification from the Commission of its decision to deny an application for a permit to construct, alter, add to, demolish or relocate property given a preliminary determination of landmark status or designated a 'Chicago Landmark,' the applicant may within thirty (30) days apply to the Commission for an economic hardship exception on the basis that the denial of permit will result in the loss of all reasonable and beneficial use of or return from the property. The Commission shall develop regulations that describe factors, evidence, and testimony that will be considered by the Commission in making its determination.

Landmarks Ordinance § 21-86.

19. On February 8, 1991, Plaintiffs filed with the Commission their Application for Economic Hardship Exception ("Application").

20. Thereafter, pursuant to the Landmarks Ordinance, public hearings were held before the Commission on March 5 and 7 and May 7 and 8, 1991, at which time Plaintiffs offered evidence to prove that they were entitled to an economic hardship exception as permitted by Section 21-86 of the Landmarks Ordinance, and the Interested Parties offered evidence in opposition thereto.

21. On July 3, 1991, the Commission rendered its final administrative decision entitled, "Report of Findings Regarding Docket No. 91-2: The Application for Economic Hardship for 1516 and 1524 North Lake Shore Drive, Part of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, a Designated Chicago Landmark". A true and correct copy of said Report, marked Exhibit A, is attached hereto and made a part hereof and is hereafter referred to as the "Decision".

22. The Decision adversely affects the legal rights and privileges of the Plaintiffs, and terminated the proceedings before the Commission.

23. Judicial review of the Decision is sought because the Decision is erroneous, illegal and void for one or more of the following reasons:

a. The Landmarks Ordinance is invalid on its face as it contravenes and violates the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law.

b. The Landmarks Ordinance is invalid on its face as it contravenes and violates the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deny to any person equal protection of the laws.

c. The Landmarks Ordinance is invalid on its face as it contravenes and violates the Fifth and Fourteenth Amendments of the Constitution of the

United States, which provide that private property shall not be taken for public use without just compensation.

d. The Landmarks Ordinance is invalid on its face as it contravenes and violates Section 2 of Article 1 of the Constitution of the State of Illinois, which provides that no person shall be deprived of life, liberty or property without due process of law nor denied equal protection of the law.

e. The Landmarks Ordinance is invalid on its face as it contravenes and violates Section 13 of Article 1 of the Constitution of the State of Illinois, which prohibits the taking or damaging of private property for public use without just compensation.

f. The Landmarks Ordinance is invalid as applied to the Subject Property as it deprives the Plaintiffs of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

g. The Landmarks Ordinance is invalid as applied to the Subject Property as it deprives the Plaintiffs equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

h. The Landmarks Ordinance is invalid as applied to the Subject Property as it effects a taking of private property for public use without just compensation in violation of the Fourteenth and Fifteenth Amendments of the Constitution of the United States.

i. The Landmarks Ordinance is invalid as applied to the Subject Property as it deprives the Plaintiffs of their property without due process of law or equal protection of the law in violation of Section 2 of Article 1 of the Constitution of the State of Illinois.

j. The Landmarks Ordinance is invalid as applied to the Subject Property as it constitutes a taking of Plaintiffs' property for public use without just compensation in violation of Section 13 of Article 1 of the Constitution of the State of Illinois.

k. The Landmarks Ordinance, upon which the Decision is predicated, is unconstitutional on its face in that in violation of the due process provisions of the Constitution of the State of Illinois and the Constitution of the United States, it establishes as a standard for determining economic hardship that the applicant must prove "that the denial of the permit will result in the loss of all reasonable and beneficial use of or return from the property." (Landmarks Ordinance § 21-86). This standard is, on its face, confiscatory and constitutes confiscatory special legislation, in that it deprives owners of property that has been designated as a landmark from enjoying or receiving the fair market value of their property without just compensation in violation of the taking provisions of Section 2 of Article 1 of the Constitution of the State of Illinois and the Fifth Amendment and Fourteenth Amendments to the Constitution of the United States.

l. The Landmarks Ordinance is unconstitutional on its face in that in violation of the Constitution of the State of Illinois, it delegates to the Commission the power to grant an economic hardship exception without providing legally sufficient criteria to be applied by the Commission in granting or denying such applications. Specifically, Section 21-86 of the Landmarks Ordinance purports to authorize and delegate to the Commission the legislative power to approve economic hardship exceptions without providing legally sufficient criteria to be applied by the Commission in determining whether to approve such applications, and without reserv-

ing to the legislative body, the Chicago City Council, the right and power to make a final decision with respect thereto.

m. The Commission's Decision to deny the Application for Economic Hardship is unconstitutional in that it prevents the Plaintiffs from implementing and perfecting their long term plan to use the funds produced by the sale and development of the Subject Property to carry out the College's mission and purposes. The Decision deprives the College of its reasonable expectation that it would receive the economic return attributable to the appreciation in the value of the Subject Property, and therefore takes the property of the Plaintiffs without compensation in violation of the taking provisions of Section 2 of Article 1 of the Constitution of the State of Illinois and the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States.

n. The Commission's Decision is arbitrary, capricious and illegal in that it is predicated upon criteria contained in its Rules and Regulations which were neither authorized nor approved by the Landmarks Ordinance, nor by the City Council.

o. The Commission's Decision is arbitrary, capricious and illegal in that it imposes on Plaintiffs the burden of proving economic hardship by clear and convincing evidence a standard contained in the Rules and Regulations, which was neither authorized nor approved by the Landmarks Ordinance, nor by the City Council, and is a standard exceeding that which is applicable to civil proceedings.

p. The Commission's Decision is arbitrary, capricious and illegal in that the criteria applied by the Commission from its Rules and Regulations is unconstitutionally vague and indefinite.

q. The Commission's Decision is arbitrary, capricious and illegal in that it applied criteria in denying the Application for Economic Hardship, which is neither contained in the Landmarks Ordinance nor the Commission's Rules and Regulations.

r. The Commission's Decision is arbitrary, capricious and illegal and against the manifest weight of the evidence in that it finds that the denial of the demolition permit applications does not deny the Plaintiffs of all reasonable and beneficial use of the properties. The five reasons stated by the Commission in support of such finding are each arbitrary, capricious and illegal and contrary to the manifest weight of the evidence.

s. The Commission's Decision is arbitrary, capricious and illegal and against the manifest weight of the evidence when it finds that the denial of the demolition permit application does not deny the Plaintiffs of all reasonable and beneficial return from the properties. The five reasons stated by the Commission in support of such finding are each arbitrary, capricious and illegal and contrary to the manifest weight of the evidence.

t. The Commission's Decision is arbitrary, capricious, and illegal and contrary to the manifest weight of the evidence in that the denial of the application not only prevents the College from going forward with the Proposed Development, but it prevents the College from its continued use of the Subject Property because the Subject Property is alleged by the City of Chicago to be in violation of the Building Code of the City of Chicago.

u. The Decision is contrary to the manifest weight of the evidence and is not supported by substantial evidence.

v. The Commission failed to make legally sufficient Findings of Fact necessary to support the Decision.

w. In denying the Plaintiffs' request for an economic hardship exception, the Commission acted arbitrarily in clear abuse of its discretion.

24. Pursuant to Section 3-108 of the Code of Civil Procedure, Plaintiffs demand that the entire transcript of evidence taken at the public hearings held on March 5 and 7 and May 7 and 8, 1991, including all exhibits and the Commission's transcript and minutes of its meeting held on July 3, 1991, be filed by Defendant Commission as part of the record in this case.

WHEREFORE, Plaintiffs request that the Court:

1. Review the Decision of the Commission on Chicago Landmarks rendered on July 3, 1991, and the record of the public hearing held on March 5 and 6 and May 7 and 8, 1991, culminating in the Decision;

2. Find and declare that the Landmarks Ordinance is unconstitutional on its face;

3. Find and declare that the Landmarks Ordinance and the Designation Ordinance as applied to the Subject Property are unconstitutional;

4. Find and declare that the Commission's failure to grant Plaintiffs' application for an economic hardship application and approve their proposed plan for redevelopment of the Subject Property be declared arbitrary, capricious and illegal, and find that Plaintiffs should be authorized to proceed with the demolition of the structures described in the demolition permits and permitted to proceed with their proposed plan for redevelopment;

5. Find and declare that the Decision of the Commission is void; and that the provisions of the Designation Ordinance as they pertain to the Subject Property are void and of no force and effect;

6. Find and declare that the Decision be reversed and held for naught;

7. Find and declare that the demolition permits requested by Plaintiffs be issued forthwith; and

8. That the Court grant such other and further relief which the Court deems lawful and proper.

Respectfully submitted,

INTERNATIONAL COLLEGE OF SURGEONS,
UNITED STATES SECTION OF THE
INTERNATIONAL COLLEGE OF SURGEONS,
and ROBIN CONSTRUCTION CORPORATION

By /s/ Richard J. Brennan
One of its Attorneys

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COMMISSION ON CHICAGO LANDMARKS

Peter C. B. Bynoe, Chairman

Report of Findings Regarding

Docket No. 91-2:

The Application for an Economic Hardship Exception
for 1516 and 1524 North Lake Shore Drive,
Part of the SEVEN HOUSES ON
LAKE SHORE DRIVE DISTRICT,
a Designated Chicago Landmark.

CITY OF CHICAGO

Richard M. Daley, Mayor

COMMISSION ON CHICAGO LANDMARKS

Report of Findings Regarding

Docket No. 91-2:

The Application for an Economic Hardship Exception
for 1516 and 1524 North Lake Shore Drive,
Part of the SEVEN HOUSES ON
LAKE SHORE DRIVE DISTRICT,
a Designated Chicago Landmark.

The City of Chicago ordinance governing the establishment, goals, purposes, and procedures of the Commission on Chicago Landmarks (the "Commission") is contained in Chapter 21, Sections 21-62 through 21-95 (the "Landmarks Ordinance") of the Municipal Code of Chicago. (In June of 1990, the Municipal Code of Chicago was renumbered and these sections are now Chapter 1-120, Sections 1-120-580 through 2-120-920. However, since most of the Landmarks Ordinance citations that follow relate to actions and documents that predate the June, 1990, re-numbering, the previous chapter and section citation numbers will be used) Section 21-65 of the Landmarks Ordinance empowers the Commission "to adopt, publish, and make available rules of procedure and other regulations for the conduct of Commission meetings, hearings, and other business." The Rules and Regulations of the Commission on Chicago Landmarks (the "Rules and Regulations") were adopted by the Commission on July 1, 1987, with technical amendments on December 5, 1990.

As directed by Section 21-88 of the Landmarks Ordinance, the Commission on Chicago Landmarks is issuing this report of its findings on an application for an economic hardship exception for the structures at 1516 and 1524 North Lake Shore Drive (the "Properties"), located within the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, a designated Chicago Landmark. This application was filed by the owners of the Properties, the International College of Surgeons and the United States Section of the International College of Surgeons (collectively, "College of Surgeons" or "Applicant"). The application followed the Commission's disapproval of four applications for permits to demolish parts of the Properties.

Following a careful consideration of the evidence and testimony presented in support of and in opposition to the application for economic hardship exception, the Commission finds that the denial of the four permits to demolish portions of the structures located at 1516 and 1524 North Lake Shore Drive does not result in "the loss of all reasonable and beneficial use of or return from the property," which is the standard set forth in Section 21-86 of the Landmarks Ordinance.

BACKGROUND

A. Landmark Designation Procedure

Landmark designation is the process, defined in Sections 21-66 through 21-73 of the Landmarks Ordinance, by which areas, districts, places, buildings, structures, works of art, and other objects are considered by the Commission and recommended to the City Council for designation as Chicago Landmarks.

Section 21-66 of the Landmarks Ordinance, which describes the reasons for a landmark designation and preservation program in Chicago, contains ten specific statements of purpose. The first two of these are:

> 1. To identify, preserve, protect, enhance, and encourage the continued utilization and the rehabilitation of such areas, districts, places, buildings, structures, works of art, and other objects having a special historical, community, architectural, or aesthetic interest or value to the City of Chicago and its citizens;
>
> 2. To safeguard the City of Chicago's historic and cultural heritage, as embodied and reflected in such areas, districts, places, buildings, structures, works of art, and other objects determined eligible for designation by ordinance as "Chicago Landmarks". . . .

The earliest formal consideration of possible landmark status for a SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT began when such a district was included in the Commission's 1988 Work Plan, unanimously adopted by the Commission on February 3, 1988. The district was defined to include four properties in the 1200 block and three properties in the 1500 block of North Lake Shore Drive. On June 1, 1988, the Commission received from its staff a report titled *SEVEN HOUSES ON LAKE SHORE DRIVE: A District Composed of 1250, 1254, 1258, 1260, 1516, 1524 and 1530 North Lake Shore Drive, Chicago, Illinois*, and an accompanying statement of the landmark criteria, contained in Section 21-66 of the Landmarks Ordinance, that the staff believed such a district fulfilled.

At its regular meeting on July 6, 1988, the Commission, by unanimous vote, adopted a resolution making a preliminary determination that the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT met one or more of the criteria for landmark designation. After this preliminary determination, the Commission followed the procedure specified in Sections 21-68 through 21-71 of the Landmarks Ordinance relating to the designation process for proposed landmarks, including obtaining a report from the Commissioner of Planning, notifying all owners, and holding a public hearing.

At the conclusion of this process, the Commission voted on May 3, 1989 to recommend designation of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT to the City Council of Chicago. The Commission's recommendation document proposed that the district met six of the seven criteria of the Landmarks Ordinance. These criteria, as related to a landmark recommendation, are:

> 1. Its value as an example of the architectural, cultural, economic, social, or other aspect of the heritage of the City of Chicago, State of Illinois, or the United States.
>
> 3. Its identification with a person or persons who significantly contributed to the architectural, cultural, economic, historic, social, or other aspect of the development of the City of Chicago, State of Illinois, or the United States.
>
> 4. Its exemplification of an architectural type or style distinguished by innovation, rarity, uniqueness, or overall quality of design, detail, materials, or craftsmanship.
>
> 5. Its identification as the work of an architect, designer, engineer, or builder whose individual work is significant in the history or development of the City of Chicago, the State of Illinois, or the United States.
>
> 6. Its representation of an architectural, cultural, economic, historic, social, or other theme expressed through distinctive areas, districts, places, buildings, structures, works of art, or other objects that may or may not be contiguous.
>
> 7. Its unique location or distinctive physical appearance or presence representing an established and familiar visual feature of a neighborhood, community, or the City of Chicago.

The document further recommended that:

> In the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, the critical features that make an essential contribution to the qualities and characteristics by which the district meets six of the seven criteria for landmark designation are: all the exterior faces of all the structures and all the streetscapes within the boundaries defined. . . . Building interiors are not considered critical features of this district.

Use of the term "critical features" was supplanted by the term "significant historical or architectural features" in a December 5, 1990, technical amendment to the Commission's Rules and Regulations. The introduction to Article III of those Rules and Regulations defines this term:

> A significant historical or architectural feature shall be any part, portion, or whole of a building or district that makes an essential contribution to those qualities and characteristics by which the building or district meets one or more of the criteria for designation.

The City Council Committee on Historical Landmark Preservation held a public hearing on the proposed designation on May 18, 1989, and voted to concur in the Commission's recommendation. On June 28, 1989, the City Council adopted an ordinance designating the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT as a Chicago Landmark. The designation ordinance specified that the district met all of the criteria that had been found applicable by the Commission, and defined the critical features (now called significant historical or architectural features) as had been recommended by the Commission.

B. Permit Review Process

The method by which the Commission reviews permit applications for alteration, construction, reconstruction, erection, demolition, relocation, or other work affecting

designated landmarks is defined in Sections 21-77 through 21-84 of the Landmarks Ordinance.

Point (5) of Section 21-65, the "Powers and Duties" section of the Landmarks Ordinance, specifically directs the Commisison:

> To review permit applications for alteration, construction, erection, demolition, relocation, or work of any kind affecting landmarks and structures or unimproved sites in landmark districts and to require the presentation of such plans, drawings, elevations, and other information as may be necessary to review those applications.

On October 10, 1990, the Commission received from the Department of Buildings of the City of Chicago four demolition permit applications, filed on behalf of the College of Surgeons, seeking approval to demolish the rear portions and the coach houses of the College of Surgeons' Properties at 1516 and 1524 North Lake Shore Drive in order to accommodate a proposed redevelopment on the site.

The Commission, by unanimous vote at an October 23, 1990, public meeting, issued a preliminary disapproval of the applications for demolition permits, as provided by Section 21-79 of the Landmarks Ordinance. The procedure the Commission then followed, defined in Sections 21-81 through 21-84 of the Landmarks Ordinance, included an informal conference with the Applicant and a public hearing on the proposed demolitions. At the conclusion of this process, the Commission, at a public meeting on January 9, 1991, voted to issue a final administrative decision to disapprove the applications and issued a written decision that contained its findings of fact on the matter. The conclusion of that report stated:

> The Commission on Chicago Landmarks finds that the Properties proposed for demolition contribute to the character of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, and that the proposed

> demolitions will adversely affect and destroy significant historical and architectural features of the improvements and district, the destruction of which would be inappropriate and inconsistent with the designation of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT and would not be in accord with the spirit and purposes of this landmark ordinance. Therefore, the Commission on Chicago Landmarks disapproves the four permits to demolish portions of the Properties located at 1516 and 1524 North Lake Shore Drive. This decision is the Commission's final decision on these permit applications submitted for review on behalf of the International College of Surgeons, October 10, 1990.

C. Economic Hardship Application

The Landmarks Ordinance, Sections 21-86 through 21-89, provides an opportunity for an owner whose permit application has been denied to seek the Commission's evaluation of whether or not the denial results in the loss of all reasonable and beneficial use of or return from the property. Section 21-86 of the Landmarks Ordinance states that:

> Upon final notification from the Commission of its decision to deny an application for a permit to construct, reconstruct, alter, add to, demolish, or relocate property given a preliminary determination of landmark status or designated a "Chicago Landmark," the applicant may within thirty (30) days apply to the Commission for an economic hardship exception on the basis that the denial of permit will result in the loss of all reasonable and beneficial use of or return from the property. The Commission shall develop regulations that describe factors, evidence, and testimony that will be considered by the Commission in making its determination.

On February 8, 1991, the College of Surgeons filed with the Commission an application for an economic

hardship exception for 1516 and 1524 North Lake Shore Drive.

As directed by Section 21-87, the Commission scheduled a public hearing on the application for an economic hardship exception for March 5, 1991. Public hearings of the Commission "shall provide a reasonable opportunity for all interested persons to present testimony of evidence under such rules as the Commission may adopt governing the proceedings of a hearing." (Landmarks Ordinance, Section 21-71.)

PUBLIC HEARING

A. Statements, Testimony, Evidence, and Exhibits

The hearing was convened on March 5, 1991. Section 21-71 of the Landmarks Ordinance, as well as Paragraphs (A) through (D) of Article II of the Commission's Rules and Regulations define the eligibility and rights of persons, organizations, or other legal entities to file requests to become parties to a public hearing proceedings held by the Commission.

As legal counsel on behalf of the College of Surgeons, appearances were filed by Daniel L. Houlihan of the law firm of Daniel L. Houlihan & Associates, Ltd. and Richard J. Brennan of the law firm of Winston & Strawn.

The 1448 North Lake Shore Drive Building Corporation and the 1500 North Lake Shore Drive Corporation, cooperative apartment buildings neighboring the site in question, filed for and were granted party status. Legal counsel for both of these entities were Thomas Z. Hayward, Jr. and Matthew Phillips of the law firm of Bell, Boyd & Lloyd.

The North State, Astor, Lake Shore Drive Association, a community organization, filed for and was granted party status. Legal counsel for this organization was attorney Thomas J. Murphy.

Since the 1448 North Lake Shore Drive Building Corporation; the 1500 Lake Shore Drive Building Corporation; and the North State, Astor, Lake Shore Drive Association were granted party status in opposition to the application for economic hardship exception, they will be collectively referred to as the "Interested Parties."

Additional sessions of the public hearing were held on March 7, May 7, and the hearing concluded on May 8, 1991. During the course of the hearing, twelve exhibits were introduced by the Commission, ninety-eight exhibits were submitted by the Applicant, and thirteen exhibits were submitted collectively by the Interested Parties. These exhibits, as well as the transcripts of the entire proceeding, are available for inspection at the office of the Commission.

On March 5, 1991, testimony was presented and exhibits were offered by the following experts in support of the application for economic hardship exception:

Alvin Edelman, attorney; general counsel to the College of Surgeons

Walker C. Johnson, architect with the firm of Holabird & Root Architects

Brian Morgan, project manager and cost estimator; Principal with the firm of Morgan Construction Consultants, Incorporated

On March 7, 1991, testimony was presented and exhibits were offered by the following experts in support of the application for economic hardship exception:

John Lahey, architect; Partner in the firm of Solomon Cordwell Buenz

John S. P. Lumley, surgeon; World President of the International College of Surgeons

Pedro A. Rubio, surgeon; President of the United States Section of the International College of Surgeons

William A. McCann, real estate broker, and consultant; President of William A. McCann & Associates, Inc.

Neil King, real estate broker, appraiser, and consultant; President of Armond D. King, Inc.

On May 7, 1991, statements were offered by six people representing organizations or other entities in opposition to the application for economic hardship exception:

Paul Krauss, representing the Board of Directors of the 1500 Lake Shore Drive Building Corporation

Barry McNamara, representing 1550 North Lake Shore Drive Condominium Association

Edwin Eisendrath, Alderman of the 43rd Ward

Mary Lou Maher, representing the Zoning Committee of the North State, Astor, Lake Shore Drive Association

Linda Sandels, representing the 1515 North Astor Condominium Association

Richard Needham, representing the Board of Directors of the 1448 Lake Shore Drive Building Corporation

In addition, 41 individuals offered statements in opposition to the application for economic hardship exception.

A written statement from Theodore Hild, Deputy State Historic Preservation Officer, Illinois Historic Preservation Agency, explaining State of Illinois preservation incentive programs that could be available to the Applicant, was entered into the record.

On this same date, testimony was presented and exhibits were offered by the following experts in opposition to the application for economic hardship exception:

Carol Wyant, Executive Director of the Landmarks Preservation Council of Illinois

John C. York, President of the investment banking firm of Robert E. Lend Company

Patricia L. Miller, Executive Director of the Illinois Heritage Association

Stephen J. Kelley, architect and structural engineer with the firm of Wiss, Jenney, Elstner Associates, Inc.

John Vinci, architect; Principal in the firm of John Vinci, Inc.

Gary J. W. Mardon, construction cost consultant; Senior Vice President of the Chicago office of Hanscomb Associates, Inc.

Jared B. Shlaes, real estate appraiser and consultant; Director of Special Real Estate Services of Arthur Andersen & Co.

The May 8, 1991, session of the public hearing consisted of cross examination of Mr. Shlaes and rebuttal testimony presented by Mr. Edelman and Mr. McCann. At the conclusion of the hearing on May 8, it was stated that any additional written material, such as rebuttals, summary briefs, or memoranda, would be received from Applicant's and Interested Parties' attorneys until May 23, 1991. This date was subsequently extended to June 3, 1991. Memoranda from both the Applicant's attorneys and the Interested Parties' attorneys were received on June 3, 1991.

At the request of the Commission, site visits to the Properties were made by Commission and staff members on April 15, and May 6, 1991.

Copies of transcripts of the public hearing and copies of the post-hearing memoranda were provided to all Commission members. In addition, copies of any exhibits requested by Commission members were provided to them. Due to the timetable set forth in Section 21-88 of the Landmarks Ordinance, the Commission was required, by

July 9, 1991, to determine whether denial of the permits denied the Applicant all reasonable and beneficial use of and return from the Properties.

B. Factors in the Commission's Consideration

Article V, Section A. "Evidence of Economic Hardship," of the Commission's Rules and Regulations contains a comprehensive list of factors, evidence, and testimony that shall be submitted by an applicant at a public hearing on an application for an economic hardship exception. These required factors, evidence, and testimony are:

1. The applicant's knowledge of the landmark designation at the time of acquisition, or whether the property was designated subsequent to acquisition.

2. The current level of economic return on the property as considered in relation to the following:

a) The amount paid for the property, the date of purchase, and party from whom purchased, including a description of the relationship, if any, between the owner of record or applicant and the person from whom the property was purchased and terms of financing between seller and buyer.

b) The annual gross and net income from the property for the previous three years; itemized operating and maintenance expenses for the previous three years; and depreciation deduction and annual cash flow before and after debt service, if any, during the same period.

c) Remaining balance on any mortgage or other financing secured by the property and annual debt service, if any, during the prior three years.

d) Real-estate taxes for the previous four years and assessed value of the property according to the two most recent assessed valuations.

e) All appraisals obtained within the previous two years by the owner or applicant in connection with the purchase, financing, or ownership of the property.

f) Form of ownership or operation of the property, whether sole proprietorship, for-profit or not-for-profit corporation, limited partnership, joint venture, or other.

g) Any state or federal income tax returns on or relating to the property for the last two years.

3. Any listing of the property for sale or rent, price asked, and offers received, if any, within the previous two years, including testimony and relevant documents regarding:

a) Any real-estate broker or firm engaged to sell or lease the property.

b) Reasonableness of the price or rent sought by the applicant.

c) Any advertisements placed for the sale or rent of the property.

4. The infeasibility of profitable alternative uses for the property as considered in relation to the following:

a) A report from a licensed engineer or architect with experience in rehabilitation as to the structural soundness of any structures on the property and their suitability for renovation.

b) Estimate of the cost of the proposed construction, alteration, demolition, or removal, and an estimate of any additional cost that would be

incurred to comply with the recommendation and decision of the Commission issued pursuant to Chapter 21, Section 21-83, of the Municipal Code of Chicago.

c) Estimated market value of the property in the current condition; after completion of the proposed construction, alteration, demolition, or removal; and, in the case of a proposed demolition, after renovation of the existing property for continued use.

d) In the case of a proposed demolition, the testimony of an architect, developer, real-estate consultant, appraiser, or other real-estate professional experienced in rehabilitation as to the economic feasibility of rehabilitation or reuse of the existing structure on the property.

Further, Article V, Section C. "Burden of Proof," of the Rules and Regulations specifies that:

> The applicant bears the burden of proof that the existing use of the property is economically infeasible and that the sale, rental, or rehabilitation of the property is not possible, resulting in the property not being capable of earning any reasonable economic return. Proof of economic hardship is not established solely by submission of proof of actual financial loss or lost opportunity to obtain increased return from the property, although these are factors to be considered by the Commission. Proof of economic hardship must be established by clear and convincing evidence.

FINDINGS OF THE COMMISSION

At a Commission meeting on July 3, 1991, the question of whether or not to grant the application for an economic hardship exception was placed before the Commission. It was moved and seconded that:

The Commission on Chicago Landmarks determines that, in the case of the February 8, 1991, application for an economic hardship exception for 1516 and 1524 North Lake Shore Drive, part of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, denial of the October 10, 1990, applications for demolition permits does not deny the Applicant all reasonable and beneficial use of or return from the Properties. Therefore, the application for an economic hardship exception is disapproved and the Commission issues this report as its final administrative decision.

This motion was adopted by a unanimous vote of the Commission members present. Section 21-88 of the Landmarks Ordinance provides, upon a decision on an application for an economic hardship exception, "The determination shall be accompanied by a report stating the reasons for the decision." The Commission's determination on the purported loss of all reasonable and beneficial use of or return from the Properties was based on assessments of both the questions of *use of* and *return from*, and took into account the entire record, including: 1) the transcript of the four hearing sessions ("Transcript," pages 1 to 867, in four volumes); 2) twelve exhibits entered by the Commission ("Commission Exhibit," Nos. 1-12); 3) ninety-nine exhibits entered by the Applicant ("Applicant Exhibit," Nos. 101-118, 401-433, 440, 501-517, 601-607, 701-705, 801-811, 901-902, 1001-1003); 4) thirteen exhibits entered by the Interested Parties ("Interested Parties Exhibit," Nos. 1-13); 5) the June 3, 1991, "Applicant's Memorandum in Support of Its Application for Economic Hardship Exception" ("Applicant Memorandum"); and 6) the June 3, 1991, "Interested Parties Memorandum in Opposition to Applicant's Request for Exception" ("Interested Parties Memorandum").

Testimony at the public hearing confirmed that the College of Surgeons purchased 1516 North Lake Shore

Drive in 1947 for $85,000 and 1524 North Lake Shore Drive in 1950 for $185,000. (Transcript, pages 459-460.) Their intended use was as headquarters for their activities, and they have continued this use up to the present day. This use includes offices in the 1516 building and the location for their International Museum of Surgical Science in the 1524 building. The Applicant owns the Properties free and clear and, as a tax-exempt organization, does not and has never paid real-estate taxes on the Properties. (Transcript, page 89.)

According to testimony of Mr. Edelman (Transcript, pages 29-38.), the College of Surgeons in January of 1988 began discussion of a proposed sale of the Properties. These discussions ultimately resulted in a contract between the College of Surgeons, as seller, and Clark E. Johnson and Erik Moskowitz, as purchasers. This contract was approved by a number of governing bodies of both the United States Section and the International College of Surgeons, and was ratified by the International Board of Governors on October 10, 1989. That ratification was fifteen months after the Commission's preliminary determination of landmark status and nearly four months after the City Council's designation of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT as a Chicago Landmark. This contract provides for: a) demolition of all but the front 40 feet of both the 1516 and 1524 buildings as well as their coach houses; b) construction of a 41-story condominium tower behind these remaining fragments; and c) an option within the development for 20,000 square feet of space for the offices and museum of the College of Surgeons.

A. All Reasonable and Beneficial *Use of* the Properties Has Not Been Lost.

In examining the entire record, the Commission finds that the denial of the demolition permit applications does not deny the Applicant all reasonable and beneficial *use of* its Properties for the following five reasons:

1) The landmark designation does not inhibit or prevent the Applicant's traditional use of the Properties.

The Applicant, in the course of the public hearing and in the Applicant Memorandum, does not once question the suitability of the Properties, in their current configuration, for use by the College of Surgeons as its headquarters and museum. Dr. Lumley, referring to the College of Surgeons, states, ". . . here we are, living in a marvelous site which is ideal[ly] suited to the requirements of the college." (Transcript, pages 263-264.)

Both Dr. Lumley and Dr. Rubio testified at length to the importance of the buildings to their organizations and to their desire and commitment to continue utilizing them. Dr. Lumley said, "And we own these buildings as our own. They are our own heritage. They are in fact something which we are proud of. . . . We realize the true worth of this, these buildings, and we intend to stay." (Transcript, page 263.) Dr. Rubio said, "But I think it is the intent and the desire of both the owners [the U.S. Section and the International College] to, if at all possible, stay in the quarters as they are forever." (Transcript, page 361.)

With particular reference to Chicago landmark designation, the applicant has stated that, "The constraints of this landmark ordinance which defines critical features as being all of the exterior faces of all the structures and all of the streetscapes freezes these properties and, frankly, dooms them." (Transcript, pages 18-19.)

The Commission finds, however, that the Applicant's contention that landmark designation is an impediment is erroneous. While the Applicant's expert witnesses testified that it was their opinion that the restraints of the landmark designation ordinance might hamper one alternative use of the Properties, the proposed redevelopment, no evidence was introduced to show that the landmark status impacts the Applicant's current use of the Properties. As

the Interested Parties Memorandum points out on page 22:

> The designating ordinance of the City of Chicago concerns only the exteriors of the Property, *not any of the interior*. The College's forty-plus years of use of the Property has only been conducted in the interior; thus, the landmark status has no impact on the College's use of the Property.

Further, while the Morgan report (Applicant Exhibit No. 402.) may allege that landmark status is obligating the College of Surgeons to bear responsibility for $7.2 million in repairs to the Properties, there is nothing mandated by landmark designation which requires an owner to maintain property in any manner greater than that provided by the City of Chicago Building Code.

The Commission notes that the Applicant has successfully used its Properties in a traditional manner since it acquired them over forty years ago, and finds no logic in the Applicant's contention that the recent landmark designation in any way deters this use from continuing into the future.

2) *The Applicant's poor stewardship may well be the only impediment to the continued use of the Properties.*

Dr. Lumley claims that the structures have deteriorated to a point beyond their financial means to adequately repair and sustain the buildings for future use: "But we also have the problem that the degeneration or deterioration of the buildings were beginning to become a considerable headache from a financial point of view." (Transcript pages 264.)

The Applicant, in testimony and in its memorandum, acknowledges a policy of deferred maintenance. Dr. Lumley testified that ". . . the members themselves think that their finances should go towards surgery and not maintenance of the building." (Transcript, page 300.) In regard to this maintenance policy, he states, "We try and be as cheap as possible." (Transcript, page 316.) Dr. Rubio testified similarly. The Commission's site inspection of the Properties confirmed this policy of deferred maintenance; the buildings' systems (heating, electrical, plumbing, etc.), for instance, are original to the structures and are approaching eighty years of service.

The Applicant Memorandum further draws attention to this deferred maintenance by stating, "The record is also undisputed that these two buildings were built at the turn of the century; that they have not had any major improvements to their principal building systems; that they are in immediate need of substantial repairs." That the College of Surgeons has shamefully neglected these buildings, while claiming that ". . . ICS has for many years treated this property as its principal asset. . ." (Applicant Memorandum, page 18.), is further evidenced by their own financial statements that show only the following amounts spent on repairs and maintenance of the Properties: $38,722 in 1988, $23,940 in 1989, and $40,341 in 1990. (Applicant Exhibit Nos. 601-606.) These amounts spent on repairs and maintenance were not detailed further. According to page 4 of the Interested Parties Memorandum:

> During those respective years, the College spent $77,167, $151,830 and $107,781 on its annual meeting, $151,338, $184,694 and $243,716 on publishing its annual journal and $365,931, $318,019 and $350,196 on salaries.

Compared to these other expenses, the amounts spent on repairs and maintenance seem disproportionately low. The Applicant has no rent expense, and during each of the last three years has expended roughly $1 per square foot for repairs and maintenance on its museum and office spaces.

The Commission finds questionable the protestations of Dr. Lumley and Dr. Rubio that the College of Surgeons desires to retain the buildings while at the same time not being able to generate any enthusiam for the Properties from its membership because, as Dr. Rubio points out, ". . . physicians don't have as much money at they used to, and they are using it for purposes that are more important than fixing a building." (Transcript, page 351.)

Nevertheless, the Commission notes that owning property does require a minimal level of maintenance even on such finely crafted and well constructed buildings as these Properties. The Commission finds it inconsistent that an organization would systematically allow to deteriorate what it claims to be its "principal asset."

3) The Properties could be improved by the Applicant for continued use for a reasonable amount of money.

The Applicant Memorandum states on page 4:

> ICS [the College of Surgeons] has neither the assets nor the ability to generate additional revenue to pay for the necessary repairs and replacements, let alone a restoration of the building to its original condition. The record is clear and uncontested that a great many of the ICS members are physicians in other countries; that many of these physicians do not have the income to pay higher dues; that the only revenue available to pay the several million dollars needed to renovate these buildings is dues and voluntary contributions; and that these sources of funds can never be sufficient to pay for the millions of dollars now needed for the buildings.

The Commission, first of all, wishes to differentiate between what are called "necessary repairs and replacements" and what is called "restoration." Landmark designation, in and of itself, does not require a level of maintenance any greater than that mandated by the Building Code of Chicago. In the best of all possible

worlds, landmark owners would have unlimited funds to restore their properties to pristine condition. The Commission recognizes, however, that this is not normally the case, either today or for the foreseeable future, and is not requiring that of the Applicant.

Mr. Johnson, an expert witness for the Applicant (Transcript, page 162.), and two expert witnesses for the Interested Parties, Mr. Kelley (Transcript, page 586.) and Mr. Vinci (Transcript, page 619.), testified that the structures are in good condition. Both Applicant witnesses Mr. Johnson (Transcript, pages 163-164.) and Mr. Morgan (Transcript, page 205.) seem to agree that the exteriors of the Properties could be repaired to a weather tight condition, with these improvements having a life expectancy of 25 to 30 years, by undertaking work that would cost approximately $480,000.

The Commission acknowledges that at the present time, according to the recent operating statements provided by the College of Surgeons, a "restoration" of the $7.2 million magnitude estimated by Mr. Morgan is not financially possible. However, this "restoration" is in fact an idealized, comprehensive, museum-quality make over of the Properties; it is not "necessary repairs and replacements." The designation of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT quite specifically relates only to the exteriors of the structures within the district; interior changes are not reviewed, and certainly not dictated, by the Commission.

The Applicant Memorandum further states:

> That the amount of immediately needed repair is substantial is demonstrated by the fact that the Interested Parties expert witness, Gary J. W. Mardon of Hanscomb, estimated that the 1524 building alone requires work amounting to $1,750,000. (Applicant Memorandum, page 5.)

The Commission notes that this estimate by Mr. Hanscomb is not for "immediately needed repair" that

is *required,* but rather for a conjectural consolidation of all the College of Surgeons' functions into the 1524 building; this possible consolidation foresees a first-class renovation to make this structure optimally usable for a museum/office complex.

The Commission's site inspection revealed the buildings to be in good physical condition and structurally sound. The Commission finds that the scope of work, estimated at $7.2 million and outlined in the "International College of Surgeons, Chicago, Illinois, Order of Magnitude Cost Estimate" (Applicant Exhibit No. 402.), to be excessive considering the good physical condition of the buildings. The report, prepared in 1991, is presented, in part, as a justification for a decision that was made at least three years earlier that rehabilitating the buildings was not economically feasible for the Applicant. The scope of work under the sections "Interior Construction," "Conveying Systems," "Special Construction," and the inclusion of "Furniture and Furnishings," for instance, appear to inflate the costs to prove a point rather than to reach an estimate of reasonable rehabilitation costs. It must be noted again that, while extensive testimony was offered as to the projected expense of interior restoration work, the interiors are not specified by the City Council as significant features in this district designation. Therefore, the Landmarks Ordinance does not require the restoration or even the retention of existing interiors, although the Commission would certainly applaud such voluntary efforts.

4) Several reasonable and feasible alternatives for use of the Properties were outlined.

In presenting its arguments for an economic hardship exception, the Applicant contends that ". . . there are no reasonable alternatives" (Transcript, page 18.) to the proposed redevelopment of the property.

The Commission finds, however, that there are several reasonable alternatives. The Applicant has apparently

not seriously investigated the reasonable alternative of consolidating its operations into one structure, thus allowing the College of Surgeons to continue at this location. Proceeds of the sale of the other structure might then finance the Applicant's rehabilitation of its headquarters building. The Applicant claims many times in the transcript that the space needs of the College of Surgeons are 20,000 square feet to accommodate both offices and the museum. The Properties, in total, contain approximately 36,000 square feet, which is 16,000 square feet in excess of the often stated requirements. The 1524 property contains over 20,000 square feet in the main building and the coach house. When the hearing officer asked Dr. Lumley whether the Applicant had considered consolidation of operations into one property, he replied, "Well, that would be feasible only that we are actually—we would then lose our museum. And our museum we look on as one of the important aspects of our developments." (Transcript, page 302.) However, the Commission heard no testimony to explain how the present 20,000 square feet in the 1524 property cannot accommodate the same office and museum functions that are envisioned for the 20,000 square feet proposed in the plan for redevelopment.

One readily apparent alternative use for either or both structures would be as a consulate. In fact, a precedent for this use has already been established in the structure at 1530 North Lake Shore Drive (immediately adjacent to and north of 1524 and also part of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT) which houses the headquarters of the Consulate General of the Republic of Poland. While two expert witnesses presented by the College of Surgeons discounted the likelihood of consulate use (Transcript, pages 376-378 and page 422.), further evidence of the desirability of the Applicant's Properties for use as a consulate was provided in an exhibit submitted by the Applicant. Applicant Exhibit No. 115 is a copy of a proposed real-estate sales contract from the

Consulate General of the People's Republic of China in Chicago, dated May 23, 1986, and offering $5.5 million for the Properties. That offer was subsequently increased to $6.5 million, but was rejected by the College of Surgeons. An expert witness for the Interested Parties, Ms. Wyant, also testified on the 1989 preliminary interest of the Japanese government in the Properties which, according to Ms. Wyant, was discouraged by the College of Surgeons. (Transcript, page 512.)

The Commission notes that, while a zoning variance might have to be obtained for use of either or both of the houses for a consulate, a track record of cooperation has already been established between the U.S. Department of State's Office of Foreign Missions in Chicago and the City of Chicago. Given too, that the alderman of the 43rd Ward, in which the Properties are located, is on record as being opposed to the proposed redevelopment plan, there is good reason to believe that the City of Chicago would be supportive of a plan that would retain the Properties "as is." It was further noted that, as well as consulates, the Properties would be equally attractive ". . . to institutional users such as libraries, private clubs, fraternal institutions, philanthropic societies, convents and monast[e]ries, all of which are permitted under existing zoning. Their size and condition allow sufficient flexibility in planning to make such uses feasible without significant interior alteration." (Interested Parties Exhibit No. 12: appraisal report prepared by Arthur Andersen & Co., page 41.) According to Ms. Wyant, interest in such a use as just listed had been expressed by Lawrence Pucci, Chairman of the Wedgewood Society of Chicago. (Transcript, pages 512-513.)

Interested Parties witness Mr. Shlaes testified that a return to solely residential use would be the most desirable use of the Properties from an economic standpoint. His conclusion, found on pages 41-42 of the appraisal report prepared by Arthur Andersen & Co. (Interested Parties Exhibit No. 12.) states:

> We therefore conclude that the highest and best use of the property as currently improved was for two single family dwellings or for institutional use as permitted by existing zoning and other legal restrictions, as of May 5, 1991.
>
> A residential buyer would benefit from at least two programs designed to encourage the rehabilitation of landmark buildings: the Cook County property tax freeze [Ill. Rev. Stat., ch. 120, pars. 501j-1 through 501j-8] applicable to landmark rehab outlays and the Federal income tax deduction allowed donors of preservation easements. These and other potential benefits further enhance the appeal of the property as residences.

The appraisal also concluded that, as of May 5, 1991, the fair market value of the Properties is $6.5 million. That a market may exist for use of the Properties as single-family homes was underscored by the testimony of Mr. Vinci, an architect acknowledged for his expertise in historic preservation. (Transcript, pages 620-622.) Mr. Vinci cited a number of his commissions for de-conversion or reuse of similar structures in the immediate vicinity of the subject Properties. The Arthur Andersen appraisal (Interested Parties Exhibit No. 12.) detailed similar examples.

Applicant's witness Mr. McCann strongly disputed the feasibility of using the Properties as either single-family homes or consulates, characterizing these possibilities as "remote, speculative, and conjectural." (Transcript, pages 841 and 843.) However, when asked if he had done a market value appraisal of the Properties, he indicated that he had not, but had instead done what he termed, ". . . an evaluation study. It's not an appraisal where I was asked to render an opinion of the market value of the properties, no. . . . I was asked to examine the properties in relation to the economic hardship as imposed by the landmark designation in relation to alternative uses to which the property may be put." (Transcript, page 847.)

The Properties may also present the potential for conversion to luxury condominiums, a use already under way for two houses at 1250 and 1254 North Lake Shore Drive, also in the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT. As discussed in the Interested Parties Memorandum (pages 29, 30 and 35.), the developer in those projects, Art Frigo, was able to take advantage of the economic incentives available for landmark-designated property. Whether or not conversion to condominiums may be the best use of the Applicant's Properties in today's economic environment is open to debate. However, some of the same incentives or benefits currently are available to the Applicant, yet apparently have been unexplored. Through a variety of programs administered by the Preservation Services Division of the Illinois Historic Preservation Agency, outlined in the written statement from Mr. Hild, Deputy State Historic Preservation Officer (Interested Parties Exhibit No. 4.), the College of Surgeons, even with their tax-exempt status, could take advantage of certain incentives and benefits for the preservation and rehabilitation of their designated Properties. The testimony of Mr. York also discussed possible ways the College of Surgeons could benefit from the donation of a preservation easement on their property. (Transcript, pages 540-549.)

5) The Applicant appears to have ignored or not fully explored a number of potentially viable sources of revenue to allow continued use of the Properties.

Mr. Houlihan, in his public hearing opening statement on behalf of the Applicant, contends that. "The ICS cannot afford to maintain these buildings in a manner consistent with the original design construction and at the same time sustain and improve its world wide mission, which is its primary duty to its members and the public at large." (Transcript, page 16.) The Applicant Memorandum, page 5, further contends that ". . . neither the offices nor the museum generate any income for the ICS,

nor have they any prospects of generating sufficient income to pay for the needed work."

The Commission finds, however, that the Applicant has ignored or left unexplored a number of potentially viable revenue sources. While the College of Surgeons currently has approximately 16,000 square feet more than its stated needs of 20,000 square feet, the organization has never rented, and made no claims to have ever tried to rent, any part of its Properties as a mechanism to produce income to help satisfy its stated revenue needs. Consolidation of the Applicant's uses into one structure, possibly the 1524 building and coach house which have at least 20,000 square feet, would free up the other structure for an alternative use either through lease or sale to generate income and pay for needed repairs. The appraised value of the 1516 building is $3.1 million.

The College of Surgeons has ignored a demonstrable source of financial aid—that of volunteer fund raising. Mr. Krauss, representing the Board of Directors of the 1500 North Lake Shore Drive Building Corporation, stated at the hearing:

> In 1988 the president of this building corporation met with various corporate heads and dignitaries of the applicants. They stated a need of approximately one million dollars for repairs and renovations to the Properties.
>
> Our president volunteered to aid in fund raising for the Applicants for that purpose. Two weeks later the applicants revised their needs to three million. Now the applicants state a need of seven million. Whatever their true needs, the applicants chose not to take advantage of the volunteered fund-raising assistance. (Transcript, page 468.)

This point was underscored by the statement of Alderman Eisendrath who indicated that:

> In fact, the neighbors have said they'd be willing to do some fund raising to make these buildings

whole again, to protect the integrity of this landmark district. That offer has fallen on deaf ears. (Transcript, page 474.)

Part of the quoted $7.2 million the Applicant claims to need for restoration would go into upgrading its International Museum of Surgical Science, yet the College of Surgeons has left untapped several potential sources of income for the museum. That the museum is an important part of the mission of the College of Surgeons was borne out by the testimony of Dr. Lumley, who said ". . . this little gem, which is well over 12,000 square feet of our present activities, is a unique part of our property. . . . And this is unique [in] that [there are] very few around the world which are purely dedicated to this." (Transcript, page 257.) He continued to attest to the importance of the museum, saying:

> And this, of course, is open to the public. It's free. We do not charge anything, and it's one of the most important public links that we have. And it's important to have it around the city of Chicago. And it's open to all students and all schools of children. (Transcript, page 258.)

However, when Dr. Lumley was questioned as to why members of the College of Surgeons were apparently unwilling to provide more contributions for the support, maintenance, and restoration of the building that houses the museum, he did concede that, "I think the college members look on their commitment to surgical development rather than bricks and mortar and maintaining landmarks." (Transcript, page 283.) Dr. Lumley did say, "We have a women's auxiliary which puts in 5, 10, 15, $20,000 every two or three years." (Transcript, page 305.)

Professional museum consultant Patricia L. Miller, an expert witness called by the Interested Parties, stated, "Many museums have an auxiliary group. They might consider expanding the base of theirs to include people

other than wives of surgeons but people who live in Chicago and other places who are interested in assisting the museum to meet its mission." (Transcript, page 559.) Ms. Miller further suggested that the College of Surgeons apply for grants available from the Medical Museum Association, the Museum Assessment Program of the American Association of Museums, and the National Endowment for the Humanities. (Transcript, page 560.) Ms. Miller's written report (Interested Parties Exhibit No. 5.) contains additional suggestions such as the deaccession of such objects not strictly related to the surgical sciences, charging an entrance fee, and opening a museum store.

A Commission request to allow Ms. Miller to have a formal interview with the museum's curator and director was denied (Commission Exhibit No. 7E.), although she did encounter them informally when she visited the museum as a member of the public. The Applicant's denial of the requested interview by Ms. Miller was based on their view that a museum assessment was not relevant to the economic hardship exception issue. (Transcript, page 567.)

The Commission acknowledges the desire of the College of Surgeons to upgrade and improve their museum facilities. Evidence presented at the hearing indicates that viable sources of funding for this purpose have been offered directly, as well as proposed. Yet no evidence was offered by the Applicant that any additional sources of financial aid had been explored at all. This lack on the part of the Applicant causes the Commission to seriously question their claim that there are no sources of revenue to assist in renovation or repair of the Properties.

B. All Reasonable and Beneficial *Return from* the Properties Has Not Been Lost.

In examining the entire record, the Commission finds that the denial of the demolition permit applications does

not deny the Applicant all reasonable and beneficial *return from* its Properties for the following five reasons:

1) The contract for the sale of the subject Properties is a single, but not controlling, factor in the Commission's consideration of the economic hardship exception application.

Under Article V of its Rules and Regulations, the Commission is required to examine a broad range of factors in determining whether an applicant has met its burden to show economic hardship. The article lists four general topics of consideration—an applicant's knowledge of [the] landmarks designation, the current level of economic return, any documentation of attempts to sell or lease the property within the last two years, and the infeasibility of alternative uses—as well as sub-topics outlining specific forms of documentation.

Moreover, the Rules and Regulations are clear as to an applicant's burden:

> The applicant bears the burden of proof that the existing use of the property is economically infeasible and that the sale, rental, or rehabilitation of the property is not possible, resulting in the property not being capable of earning any reasonable economic return. Proof of economic hardship is not established solely by submission of proof of actual financial loss or lost opportunity to obtain increased return from the property, although these are factors to be considered by the Commission. Proof of economic hardship must be established by clear and convincing evidence. (Rules and Regulations, Article V, Section C.)

Under this language, it is appropriate for the Commision to investigate what, if any, efforts were made to sell or lease or otherwise use the Properties in a manner consistent with their designation as part of a landmark

district. This information helps the Commission in determining whether the Applicant has truly explored alternative uses from which a reasonable return could be obtained. Conversely, it aids the Commission in determining whether the proposed demolition and redevelopment is the only option for the Properties such that the denial of the demolition permit truly results in an economic hardship.

From the record it is clear that the Applicant has made no attempts to sell, rent, mortgage, or otherwise use the Properties in such a way as to generate a reasonable return. When asked if the Properties had been listed with a broker within the last two years, Mr. Edelman replied that they had not. (Transcript, page 92.) In response to questions regarding whether either of the Properties were leased and whether the Properties carried a mortgage, Mr. Edelman responded in the negative to both questions. (Transcript, page 92.) The Commission believes that these options, if explored, would enable the Applicant to generate funds sufficient to make the necessary repairs to the Properties, as discussed earlier, and to provide additional income from the Properties.

The Applicant offers a sales contract as its sole alternative to the present use of the Properties. This contract, Applicant Exhibit No. 103, is between the Applicant, as seller, and Clark E. Johnson and Erik Moskowitz, as purchasers. Mr. Johnson's interest was subsequently assigned to Robin Construction Corporation by a document, dated August 11, 1989. (Transcript, pages 59-60, and Applicant Exhibit No. 103A.) According to the testimony of Mr. Edelman, negotiations on the contract began in January, 1988, and it was executed by a representative of the seller in February, 1989. The contract was ratified by the seller's International Board of Governors on October 10, 1989. (Transcript, pages 29-34.)

Under the contract, the seller will transfer title of the two Properties to the purchaser for redevelopment as a

41-story highrise condominium building. The contract is contingent on the seller's obtaining all necessary permits and approvals for the redevelopment. According to Mr. Edelman, the purchase price is $17 million, with adjustments. (Transcript, pages 35-36.) The contract provides that only the front, or east, 40 feet of both the 1516 and 1524 buildings will be retained, while everything else on the lots, being the rear portions of the two main structures and their coach houses, will be razed for the construction of the highrise. (Transcript, page 36.) The seller has an option to acquire up to 20,000 square feet of office space in what would be the remaining portions of the 1516 and 1524 buildings.

Although the contract is certainly a relevant document for the Commission's considerations, the Commission finds it is not the controlling factor in the determination of whether the Applicant has a viable economic hardship exception claim. The Applicant's principal argument is that the denial of demolition permits for the subject Properties would prevent the sale of the Properties under the contract it presently has with Mr. Moskowitz and Robin Construction Corporation. The Commission notes that while refusal to grant the demolition permits may preclude the fulfillment of the present contract, such a circumstance on its own does not satisfy the Applicant's burden under the Rules and Regulations: to show that the sale, rental, or rehabilitation of the property is not possible. (Rules and Regulations, Article V, Section C.) It merely shows that one sale is not possible. To give the disproportionate weight to the contract that the Applicant seeks would effectively preclude the extensive testimony by the Interested Parties on the sale, rental, or rehabilitation alternatives that are outlined in the Rules and Regulations.

It is clear from the Rules and Regulations that the burden on the Applicant in this economic hardship proceeding is to demonstrate that present as well as reasonable, theoretical alternative uses are not feasible, and that in the face of such infeasible uses, there is no reasonable

economic return for the Properties. The Commission believes that the Applicant's evidence was limited to discussions of its present use and return of the properties and to the use and return under the proposed contract. The Applicant's case is wanting for demonstrations of a good-faith effort to market or otherwise propose the use of the Properties in a manner that is consistent with the spirit of the Landmarks Ordinance in general and the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT designation ordinance specifically. In this regard, the Applicant's burden to demonstrate the infeasibility of reasonable alternative uses or reasonable economic returns has not been met.

2) The contract does not establish a value for the Properties.

In reviewing the current level of economic return on property that is the subject of an economic hardship exception application, one of the items discussed in the Rules and Regulations is any real estate appraisals obtained within the previous two years. No such appraisals were submitted by the Applicant. It seems, rather, that the Applicant fixes the alleged value of the properties at a total of $17 million, based on the amount that the Applicant purports it will receive under the terms of the sales contract. This contract, however, is so speculative that the Commission cannot accept the $17 million figure the Applicant claims as the value. Also, the contract, executed in contemplation of the proposed demolition of significant historical and architectural features of the landmark Properties, can in no way be construed as an appraisal of the Properties "as is," subject to all applicable landmarks and zoning ordinances. The only such appraisal of the Properties in their present state was submitted by the Interested Parties as their Exhibit No. 12.

Although the Applicant claims that the contract has a value of $17 million if the Properties are redeveloped, the

terms of the contract show that the amount is subject to adjustments. (Applicant Exhibit No. 124.) The contract provides $500,000 of earnest money, $12 million at the closing, and the purchaser's non-recourse promissory note for the balance, subject to adjustments based on future condominium sales. (Applicant Exhibit No. 103.) According to Mr. Shlaes, the final price is effectively "contingent upon the successful sale of the condos to be built at the back of this property under very adverse market conditions." (Transcript, page 810.) Elaborating on this situation, Mr. Shlaes testified:

> The price is based on the saleable area of 250,000 square feet of the building. If that area is reduced under the terms of the contract, the price is reduced at the rate of $68 per square foot, a substantial reduction, in my opinion three times roughly what would be necesary to compensate for the loss of density based on my analysis of the land prices in the area.
>
> But if the allowable building falls below 176,471 square feet, the adjustment would reduce the price to just over $12 million, not the $17 million stated. And of that $12 million, a portion is contingent on the successful sale of the condominiums to be developed. (Transcript, pages 810-811.)

Noting that the contract is more than two years old, and that its price is dependent "on the performance of the developer in the marketplace when he actually goes to sell the units," Mr. Shlaes concluded:

> I read all this and read it as extremely speculative. It would be unlikely to be enforced by a prudent purchaser in today's market because of the state of the market about which I wrote fairly extensively in this report and with which the board is no doubt familiar.

> The price, in my opinion, is so high as to make the merits of the deal questionable. And I accordingly treated it as a contract that would not likely be available in today's market even at the adjusted price that one might reach after taking out the contingent elements that I have testified to. (Transcript, page 812.)

The Commission notes that the sale price would be further lowered by the Applicant's exercise of the option to purchase the space in the portions of the original buildings remaining after the redevelopment. (Applicant Exhibit No. 103.) Purchase of this space by the applicant could reduce the purchase price by $2.1 million. (Interested Parties Memorandum, page 22.) Other provisions, such as that for the amount payable by the seller for post-closing possession, could reduce the payment still further. (Applicant Exhibit No. 103.)

The Commission rejects the notion that the "sales price" should be the basis for fixing the value of the Properties for the purposes of the economic hardship exception proceeding. Assuming, though, that such a price was valid for this purpose, the Commission finds that the contract is subject to a number of conditions affecting the ultimate price and, therefore, an amount based on these conditions is too speculative for valuation purposes.

Dr. Rubio testified [that] an appraisal of the properties was undertaken in order to help establish the Applicant's earlier $12 million asking price. (Transcript, page 361.) Although it is inferred that that appraisal is more than two years old, the period specified in Article V of the Rules and Regulations, the submittal of such an appraisal by the Applicant would have aided the Commission's analysis. The Commission had specifically requested any appraisals made between 1986 and now. (Commission Exhibit No. 7C.)

The Commission finds that the only credible evidence of the value of the Properties, in their present condition

and subject to *all* local ordinances, was the appraisal done by Arthur Andersen & Co. (Interested Parties Exhibit No. 12.) It appraises the Properties, for the purposes of establishing their market value, at $6.5 million. No such appraisals were submitted by the Applicant. Neither of the Applicant's two financial experts, Mr. King nor Mr. McCann, had been asked to do so by the Applicant. Mr. McCann testified that he was not asked to appraise the Properties but to "examine the properties in relation to the economic hardship as imposed by the landmark designation in relation to alterative uses to which the property may be put." (Transcript, page 847.) He characterized his analysis as an "evaluation study," not an appraisal, noting that the two were distinctly different. The Commission agrees that the two are completely different, which is why the factors under Article V of the Rules and Regulations [specify] appraisals of current value as well as studies of hypothetical uses.

The reasonableness of the Arthur Andersen appraisal for $6.5 million is underscored by evidence that the Peoples Republic of China offered to purchase the Properties in 1986 for $6.5 million, presumably for use as a consulate. (Transcript, pages 53-56.) That offer was rejected by the College of Surgeons.

The attitude of the Applicant toward the contract is summed up in a statement by Mr. McCann: "I think the contract is probably the best evidence as to the value of the property for its highest and best use, yes, sir." (Transcript, page 860.) Asked if there were other uses for these Properties, other that the proposed redevelopment, that would still provide an economic return to the owner, Mr. McCann responded:

> The properties are capable of producing an economic return. I think the question for a real estate appraiser such as myself and Mr. Shlaes is whether or not it's a reasonable economic return given the location and characteristics of the property and the market in which it's located. (Transcript, page 846.)

The Commission concludes that there are other reasonable alternative uses for the Properties, but that the contract submitted by the Applicant is premised solely on what Mr. McCann calls the Properties' "highest and best use." Inasmuch as a "highest and best use" standard is inconsistent with the "reasonable economic return" of the Rules and Regulations, the Commission feels that the value it purports to assign to the Properties is not the determining factor in this economic hardship proceeding.

3) The Commission is required to determine if there has been a loss of all reasonable return, not the highest and best return.

Both the Applicant and the Interested Parties have submitted their memoranda which include discussions of the Supreme Court's ruling of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Thus, the Commission feels compelled to briefly discuss its understanding of the *Penn Central* case, without issuing a conclusion on the legal debate raised by the memoranda; such conclusions are outside of the Commission's expertise.

The Commission understands that *Penn Central* affirms the laudatory goals of historic preservation in general, and landmark ordinances in particular, and notes the striking similarity between the New York City landmark ordinance involved in *Penn Central* and the Chicago Landmarks Ordinance as applied to these Properties.

Penn Central seems to set a permissibly high standard in determining whether a landmark designation constitutes a governmental "taking" of property. The Applicant would have the Commission believe that a "taking" occurs whenever a designation prevents a landowner from developing a property to its "highest and best use." This

proposition is inconsistent with the Commission's understanding of the letter and spirit of *Penn Central* and subsequent court decisions. In the context of a landmark designation, denying an applicant the highest and best use of a property is not a denial of all reasonable and beneficial use or return. In fact, according to *Penn Central*, a designation that does not prevent the applicant from the continued use [of] the property does not amount to either a taking or an economic hardship.

The Applicant has failed to demonstrate clearly and convincingly that the inclusion of the Properties in the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT prevents the College of Surgeons from continuing to use the buildings as offices and a museum. Based upon the testimony of Interested Parties' witnesses Mr. Kelley (Transcript, page 586) and Mr. Vinci (Transcript, page 619) and the Commission's own site inspection, the Applicant has failed to demonstrate that the Properties are uninhabitable or unsuitable for its continued use as a museum and administrative offices. In fact, the designation seems to invite this continued use.

Also, the Applicant fails to show how the designation prevents alternative uses for the Properties. That is, the Applicant fails to show how the denial of demolition permits to allow construction of a 41-story condominium building in place of the majority of the Properties' significant historical and architectural features prevents the College of Surgeons from exploring other more appropriate uses of the Properties.

The Commission finds that the denial of demolition permits which prevents the Applicant's "highest and best use" of the Properties, i.e., the right to build a high-rise condominium building in place of substantial portions of landmark-designated Properties, does not deny either the right to continued use of or other reasonable alternative uses of or return from the Properties.

4) Other alternatives were demonstrated for the reasonable economic return on the Applicant's properties.

Several witnesses for the Applicant discussed the point that the College of Surgeons has consistently desired to maintain its presence in the Properties. Yet, as indicated in the public hearing testimony, the Applicant has taken few positive steps toward that end; rather, it has consistently deferred capital improvements to the Properties while entertaining various redevelopment proposals that have been brought to it. With the exception of two versions of a 1966 plan commissioned by the College of Surgeons (Transcript, pages 39-42.) which were ultimately rejected by the Applicant's membership, the Applicant has never initiated any other plans for the reuse, rehabilitation, or redevelopment of the Properties. By its actions, or inactions, the Applicant manifests an indifferent attitude toward the Properties' continued use.

According to its witnesses, the Applicant has never attempted to sell or lease one of the Properties in order to generate funds to keep and maintain the other. (Transcript, pages 89, 91-92.) Given that the Applicant claims space needs of 20,000 square feet, the approximate square footage of the 1524 building and coach house alone, the sale or lease of the 1516 property seems an obvious alternative to be explored. Nor, according to public records of the Recorder of Deeds of Cook County, has the Applicant mortgaged the Properties anytime within the last 20 years to raise funds for improving them.

The Commission believes that a sale of either of the Properties for the amounts of the Arthur Andersen & Co. appraisal, $3.1 million for 1516 and $3.4 million for 1524, would represent a reasonable return on the Applicant's initial investment. The Applicant purchased the 1516 property in 1947 for $85,000, and the 1524 property in 1950 for $185,000. Using these figures, Mr. Shlaes responded to a question about reasonable return:

There are a number of ways to consider that question. I'll offer you two.

One, looking first at the acquisition cost, the 1516 property was acquired January 21, 1947, for $85,000. Today it's worth $3,100,000 by my appraisal process. And that's been 44 years.

I have a little calculator, like most real estate appraisers. And I put those numbers into my little calculator, and it said that without regard to any rental value, simply starting with $85,000 and ending at $3,100,000 forty-four years later, the compound annual net return was 8.52 percent, which is a lot higher than the returns being required by investors in real estate, savings accounts, U.S. Bonds or anything else in 1947.

I then tested this inputing a little bit of rental value to the property. After all, the occupant owner has enjoyed the benefit of the use and occupancy of the property for 44 years.

And I took as rent 6 percent of the investment, 6 percent of $85,000, and in effect wrote to them a flat lease, no escalations, no increases, no anything for 44 years at 6 percent rent on the initial cost, which comes to $5,100 a year, and added that to the gain in value over the 44 years. Doing that brought me to an annual compound return of 10.57 percent.

If you are willing to use a rate of 10 percent which would be—a rent of—based on 10 percent of the property value, which today would be more realistic, the corresponding yield would be 12.5 percent.

I went through similar calculations on the Countiss House [1524] which was acquired June 22, 1950, for $185,000 and is today worth $3,400,000.

Looking only at the capital gain without regard to the use of the property over the 41-year period, the

return is 7.36 percent, again very favorable compared to the other returns available at the time.

The gain with a rent calculated at 6 percent of the acquisition cost, remaining flat throughout the term of the lease, the rent would be $11,100 a year. The yield would be 9.78 percent.

Increasing the rent to 10 percent of the acquisition cost or $18,500 a year flat for 41 years, the return would be 12.01 percent.

In real life, these rents would have been adjusted upward over time to reflect rising values and inflation, so that the actual return had by the owners over this period is substantially higher than the figures I have given you, which I believe are extremely conservative. (Transcript, pages 738-740.)

The Commission finds that, based on the acquisition costs and appraised value for the Properties, the return on the Applicant's investment is 8.52 percent for 1516 and 7.36 percent for 1524. According to Mr. Shlaes, both [of] these returns exceed returns required by investors when the Properties were purchased.

The Commission notes further that the Applicant has had the use and benefit of the Properties, without rental expense, throughout its ownership. The amount of the rental savings that has accrued to the Applicant over the years, at this prime location, constitutes a significant return. According to Mr. Shlaes, when some moderate rental value is considered, the annual net return on the Properties is increased to between 10.57 and 12.5 percent for 1516 and to between 9.78 and 12.01 percent for 1524. The Commission believes that this return, with rental savings factored in, constitutes a significant and continuing economic return from the Properties.

As discussed earlier, the Applicant received an offer to purchase the Properties in 1986 from the Consulate

General of the People's Republic of China. (Transcript, page 55; Applicant Exhibit No. 115.) That offer, for $6.5 million, was rejected by the Applicant. The Commission notes that, when adjusted according to the Consumer Price Index, the $6.5 million amount of 1986 would equal $8.2 million today.

The Commission believes that other alternatives exist for which a reasonable economic return can be realized, alternatives that would use the Properties in substantially their present form. This view is based on the evidence offered of the appraised values of the Properties and the returns calculated on the Applicant's purchase prices and, further, on the evidence of interest in purchase of the Properties, particularly the offer of $6.5 million in 1986.

5) The Applicant had knowledge of the Commission's consideration of landmarks designation and of the eventual designation itself.

The Commission began its consideration of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT on June 1, 1988, when it received a report on the district from the Commission staff. In a letter dated that same day, the Commission notified the Applicant of this proposal, included a copy of the staff report, and specifically invited the Applicant to attend the July Commission meeting, when the proposed district would be discussed. (Applicant Exhibit No. 101.) At that July 6, 1988, public meeting, the Commission made a preliminary determination that the district met one or more of the criteria for landmark designation. Such a determination requires that all applications for building or demolition permits relating to such property be forwarded to the Commission for its review. (Landmarks Ordinance, Section 21-77.) The Applicant was notified of this preliminary determination by a certified letter dated July 6, 1988. (Applicant Exhibit No. 102.)

Thereafter, the Commission followed the designation procedure and all notice provisions outlined in the Landmarks Ordinance. The Commission convened a public information meeting for the property owners within the proposed district on September 22, 1988; the Applicant was represented at that meeting by its International Secretary General and legal counsel. A public hearing on the proposal was scheduled for April 7, 1989. At the specific request of the Applicant, the Commission continued the hearing to April 26, 1989. Representatives of the Applicant and its legal counsel appeared at the hearing.

Following the hearing, at a May 3, 1989, public meeting, the Commission voted to recommend the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT to the City Council for its consideration of Chicago Landmark status. Legal counsel represented the Applicant at both that meeting and at the subsequent hearing of the City Council Committee On Historical Landmarks Preservation, held on May 18, 1989. The SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT was designated by ordinance as a Chicago Landmark on June 28, 1989. Notifications of the designation were mailed by certified mail to all owners, including the Applicant, on August 21, 1989.

The Commission notes that the Properties are not only within a designated Chicago Landmark district but also were listed on the National Register of Historic Places in 1978 as part of the "Gold Coast Historic District," and in 1982 were listed individually on the Illinois Register of Historic Places. Regarding the process of listing on the Illinois Register, Mr. Edelman testified, "Throughout the years, including initiation of litigation in 1982, the International College of Surgeons has continuously and consistently objected to actions to encumber its properties with landmark status." (Transcript, page 16.) However, the Commission notes that, contrary to the claim of

consistent opposition, the Applicant, on March 1, 1983, voluntarily dismissed its complaint challenging the Properties' listing on the Illinois Register.

According to testimony at the public hearing, 1516 North Lake Shore Drive was purchased by the College of Surgeons in 1947; 1524 North Lake Shore Drive was purchased in 1950. (Transcript, pages 459-460.) The Applicant claims it has continuously used the Properties principally as the location of its administrative offices and International Museum of Surgical Science. According to Mr. Edelman, in 1966 the Applicant proposed to redevelop the site with a residential high-rise, including space for the Applicant's offices and museum. That plan was not carried out due to the unavailability of financing. (Transcript, page 43.) Subsequently, the College of Surgeons received several offers to purchase the Properties, for either the continued use of the present structures or for demolition and redevelopment. Mr. Edelman testified that negotiations for the current sales contract began in January, 1988 (Transcript, page 56.); that the contract was signed by the College of Surgeons' International Executive Council on March 30, 1989; and was ratified by the International Board of Governors on October 10, 1989. (Transcript, page 34.)

Based on this chronology, the Applicant claims that its "development expectations" must be taken into account "in determining whether the City's power to landma[illegible] [*sic*] a building constitutes a permissible interference with a property owner's right to develop property in a way that was permissible when the property was acquired." (Applicant Memorandum, page 11.) The Applicant, in effect, purports that the Applicant's expectations *at the time of purchase* control the ultimate redevelopment of the Properties. The Commission notes that such an argument, carried to its logical conclusion, would preclude the application of any duly authorized regulatory ordinance on a property where the statute was enacted subsequent to the purchase of the property. Under the Applicant's logic not only are the provisions of the Chicago Landmarks Ordinance, enacted in 1968, inapplicable to its Properties to the extent the ordinance interferes with the applicant's perceived development expectations, so too is the Lake Michigan and Chicago Lakefront Protection Ordinance which was adopted in 1973. Such an interpretation is too erroneous for serious consideration.

As outlined above, the Commission has consistently provided the Applicant with notice of all of the Commission actions taken with regard to the Applicant's Properties. The first formal notice of the Commission's proceedings dates from June of 1988. Designation of the Properties by ordinance, as part of the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT, occurred on June 28, 1989. The Applicant was apprised of these and all intervening actions. Additionally, the Applicant was on notice of the overall historical and architectural significance of the Properties as early as 1978, with the inclusion of the Properties in the National Register "Gold Coast District," and certainly no later than 1982, when the Properties were listed on the Illinois Register.

Despite these notices and with full knowledge of the Commission's actions, the Applicant took part in negotiations for a sale contract in contemplation of the proposed high-rise development. The contract was not ratified until October of 1989, four months following the City Council designation and sixteen months after the Commission's initial notice to the Applicant.

The rule cited by the Applicant in its own memorandum defines the threshold for establishing an owner's development expectations:

> . . . any substantial change of position, expenditures, or incurrence of obligations occurring under a *building permit or in reliance upon the probability of its issuance* is sufficient to create a right in the permittee

> and entitles him to complete the construction and use the premises for the purposes originally authorized irrespective of a subsequent zoning or change in zoning classification. (emphasis added) (Applicant Memorandum, page 12, citing *Fifteen Fifty No. State Bldg. Corp. v. City of Chicago*, 15 Ill.2d 408, 416, 155 N.E.2d 97, 101 (1958).)

The language of the cited opinion seems to clearly indicate that legitimate development expectations arise only in the context of an issued building permit or in the probability of its issuance. The City has issued no permits for the subject Properties; the issuance of demolition permits is, of course, a vital component of the present action. Because no permits have been issued, it cannot be said that the Applicant "changed its position" in reliance on a building permit or the probability of its issuance. Indeed, the Applicant's own contract is contingent on the Applicant obtaining all the necessary permits for demolition and construction. (Applicant Exhibit No. 103.) This contingency is inconsistent with the Applicant's assertion of a clear-cut, unwavering belief of its right to develop the Properties as a high-rise condominium building.

The Commission notes that the various approvals sought by the Applicant have not been obtained. The Commission denied the Applicant's applications for four demolition permits in January, 1991. On May 9, 1991, the Chicago Plan Commission denied the application for Lakefront Protection Ordinance approval, and recommended the denial by the City Council of an ordinance to amend the zoning classification from R-8 to a Residential Planned Development. On June 12, 1991, the City Council denied the ordinance to amend this zoning.

The Commission rejects any notion that the inclusion of the Applicant's Properties within the SEVEN HOUSES ON LAKE SHORE DRIVE DISTRICT and the denial

of the demolition permit applications by the Commission have denied the Applicant of its "investment expectations." Any such investment expectations were formed by the Applicant while on notice of and in disregard of the pending status and eventual passage of the landmark designation ordinance.

CONCLUSION:

The Commission on Chicago Landmarks issues this report as its final administrative decision finding that no economic hardship resulted to the International College of Surgeons and the United States Section of the International College of Surgeons from the Commission's January 9, 1991, decision to disapprove the four permit applications to demolish portions of the Properties located at 1516 and 1524 North Lake Shore Drive.

/s/ Peter C. B. Bynoe
PETER C. B. BYNOE
Chairman

Dated: July 3, 1991

/s/ William M. McLenahan
WILLIAM M. MCLENAHAN
Director

[City Seal]

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January 10, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Nos. 91 C 1587 and 91 C 5564
Consolidated

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

MEMORANDUM OPINION

This action, arising under the Fifth and Fourteenth Amendments to the federal Constitution, comes before the court on defendants' motions to dismiss plaintiffs' complaints pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, defendants' motions are granted in part and denied in part.

FACTS

Plaintiffs International College of Surgeons and the United States Section of the International College of Surgeons (collectively, "the College") own, as tenants in common, two parcels of land at 1516-1524 North Lake Shore Drive in Chicago, Illinois (the "subject property"). Complaint for Administrative Review, 91 C 1587 ("First Complaint") at ¶¶ 1, 8. The subject property contains two buildings (in which the College operates its administrative headquarters and museum) and a coach house. First Complaint at ¶ 8, 10.

Following a public meeting on July 6, 1988, defendant Landmarks Commission ("the Commission") made a preliminary determination that the subject property and five other parcels met one or more of the criteria for landmark designation. The College was notified of the preliminary designation by certified mail. On September 22, 1988, the Commission held a public information meeting for all property owners within the proposed district. The College was represented at that meeting by its International Secretary General and legal counsel. Complaint for Administrative Review, 91 C 5564 ("Second Complaint"), Exhibit "A" p. 27.

In February 1989, after months of negotiations, the College contracted with plaintiff Robin Construction Company ("Robin") for the sale and redevelopment of the subject property. Second Complaint at ¶ 10, First Complaint at ¶ 2. Four months later, upon the recommendation of the Commission and despite the College's objections, the Chicago City Council enacted a designation ordinance officially naming the subject property and five other parcels as "The Seven Houses on Lake Shore Drive Landmark District" (the "Seven Houses District") pursuant to Chicago's Landmarks Ordinance. First Complaint at ¶ 9.

Applications for Demolition Permits: Case No. 91 C 1587

On October 5, 1990, plaintiffs applied to the Chicago Building Department for permits to demolish the coach house and rear portions of the main buildings on the subject property. First Complaint at ¶ 10. Pursuant to the Landmarks Ordinance, the Building Department referred plaintiffs' applications to the Commission. On October 23, 1990, the Commission issued a preliminary decision denying the demolition permit applications on the ground that the proposed destruction would detract from or eliminate "critical features" of the Seven Houses District. First Complaint at ¶ 11.

In November 1990, the Commission held an informal conference on the permit applications, at which plaintiffs were allowed to present a partial description of their proposed redevelopment plans. However, the Commission refused to consider any redevelopment evidence on the ground that it was not material to the consideration of plaintiffs' demolition permits. First Complaint at ¶ 12. On December 18, 1990, the Commission held a public hearing on the permit applications, and the plaintiffs again sought to present evidence of the proposed redevelopment. Again, the Commission refused to consider any evidence of plaintiffs' redevelopment plans and the hearing officer would not allow plaintiffs to make an offer of proof as to the unconsidered evidence. First Complaint at ¶ 13.

On January 9, 1991, the Commission issued its final administrative decision denying plaintiffs' requests for demolition permits. First Complaint at ¶ 14, Exhibit "A." Plaintiffs filed a state court complaint for administrative review on February 13, 1991. Defendants filed a notice of removal on March 15, 1991, on federal question grounds.[1]

Although it was drafted as a state court complaint for administrative review, plaintiffs' complaint raises several federal constitutional issues. Plaintiffs allege that the Landmarks Ordinance is unconstitutional on its face and as applied because it: (1) denies due process by authorizing the Commission to preliminarily designate property as a "landmark" without affording the owners notice and an opportunity to object before the preliminary designation is applied (First Complaint at ¶ 16(a)); (2) violates equal protection by excluding religious organizations' church buildings from the Landmarks Ordinance without exempting other not-for-profit organizations (First Com-

[1] This court denied plaintiffs' motion to remand the case on August 27, 1991.

plaint at ¶ 16(d)); (3) constitutes a taking in violation of the Fifth and Fourteenth Amendments because it prevented plaintiffs from implementing redevelopment plans that were adopted before the designation ordinance was passed (First Complaint at ¶ 16(e)). Plaintiffs allege that the designation ordinance denies them equal protection and due process because: (1) it arbitrarily and capriciously groups seven noncontiguous buildings into the "Seven Houses District" (First Complaint at ¶ 16(f)); (2) it arbitrarily and capriciously designates every facade of every building in the district as "protected," while other designation ordinances "landmark" only those portions of the buildings which can be seen from the public way (First Complaint at ¶ 16(g)). Plaintiffs also allege that the Commission denied them equal protection and due process by treating them inequitably in comparison to other owners of "landmarked" property (First Complaint at ¶ 16(g)).[2] Plaintiffs argue that the Commission deprived them of their procedural due process rights by: (1) refusing to allow them to present evidence that the "Seven Houses District" designation ordinance was arbitrary and capricious (First Complaint at ¶ 16(g)); (2) refusing to consider evidence of their proposed redevelopment (First Complaint at ¶ 16(j)); and (3) conducting plaintiffs' hearing in a biased and adversarial manner (First Complaint at ¶¶ 16(h)(iii), (iv).

Economic Hardship Exception: Case No. 91 C 5564

On February 8, 1991, plaintiffs applied to the Commission for an "economic hardship exception." Second

[2] Plaintiffs allege that the designation of all facades was solely to prevent the College's proposed redevelopment, noting that other owners of landmarked property (1250 and 1254 Lake Shore Drive) were permitted to demolish and redevelop parts of their properties. Plaintiffs contend that the Commissions' refusal to permit their demolition and proposed redevelopment violates due process and equal protection in light of their permitting others to demolish and redevelop parts of their structures that cannot be seen from the public way. First Complaint at ¶ 16(g).

Complaint at ¶ 19. The Landmarks Ordinance provides that an applicant whose request for a construction or demolition permit is denied "may within thirty (30) days apply to the Commission for an economic hardship exception on the basis that the denial of permit will result in the loss of all reasonable and beneficial use of or return from the property . . . ." Landmarks Ordinance § 21-86. On March 5 and 7 and May 7 and 8, 1991, the Commission held public hearings on plaintiffs' application for an economic hardship exception, at which plaintiffs offered evidence to prove their entitlement to the exception and interested parties offered evidence in opposition. Second Complaint at ¶ 20. On July 3, 1991, the Commission issued its final administrative decision denying plaintiffs' application for an economic hardship exception. Second Complaint at ¶ 21, Exhibit "A."

Plaintiffs filed a complaint for administrative review in state court on August 7, 1991. On September 3, 1991, defendants filed a notice of removal on federal question grounds. Plaintiffs allege that the Landmarks Ordinance is unconstitutional on its face and as applied to the subject property because it: (1) violates due process guarantees of the Fourteenth Amendment (Second Complaint at ¶¶ 23(a), (f), (k)); (2) denies equal protection of the laws in violation of the Fourteenth Amendment (Second Complaint at ¶¶ 23(b), (g)); (3) constitutes an uncompensated taking in violation of the Fifth and Fourteenth Amendments (Second Complaint at ¶¶ 23(c), (h), (k)).

After removal to this court, plaintiffs' economic hardship suit (91 C 5564) was consolidated with their demolition permit action (91 C 1587). Defendants now seek to dismiss plaintiffs' complaints pursuant to Federal Rule of Civil Procedure 12(b)(6).

DISCUSSION

In considering a motion to dismiss, the court accepts the truth of all facts alleged in plaintiffs' complaint and draws all reasonable inferences from the pleadings in plaintiffs' favor. *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir. 1989). Dismissal is appropriate " 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *Kunik v. Racine County, Wisconsin*, Nos. 90-1234, 90-1235, 90-1262 & 90-1330, slip op. at 10 (7th Cir. Oct. 30, 1991) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

The "Takings" Allegations

Plaintiffs allege that the Landmarks Ordinance is invalid both on its face and as applied because it effects an uncompensated taking in violation of the Fifth and Fourteenth Amendments. First Complaint at ¶ 16(e), Second Complaint at ¶¶ 23(c), (h), (k). Specifically, plaintiffs contend that the Landmarks Ordinance's standard for economic hardship is facially unconstitutional because it requires an applicant to prove that "denial of the permit will result in the loss of all reasonable and beneficial use of or return from the property" and fails to compensate landmark owners who are unable to enjoy or receive the fair market value of their property. Second Complaint at ¶ 23(k). Plaintiffs argue further that the Landmarks Ordinance constituted an uncompensated "taking" as applied to the subject property because it barred implementation of redevelopment plans that were adopted before the passage of the "Seven Houses District" designation ordinance. First Complaint at ¶ 16(e).

The Supreme Court has held that New York City's landmarks ordinance did not effect a "taking" of a landmark owner's property because the restrictions promoted the public interest in preserving historic buildings while

permitting "reasonable beneficial use of the landmark site" and a " 'reasonable return' on [the owner's] investment." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136, 138 (1978). Similarly, the Chicago ordinance's standard for economic hardship recognizes a landmark owner's need for "reasonable and beneficial use of or return from the property." As the *Penn Central* Court observed, "the 'taking' issue in these [land-use regulation] contexts is resolved by focusing on the uses the regulations permit." *Id.* at 131. Here, as in *Penn Central*, the Landmarks Ordinance does not affect plaintiffs' ability to continue using the subject property as a corporate headquarters or museum. *See id.* at 121. Although the Commission refused to permit the demolition of portions of the main buildings and coach house, it did not foreclose any redevelopment of the subject property or any different use.

The fact that plaintiffs may not be able to make the most profitable use of the subject property is not sufficient to state a "takings" claim, *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962), and "the submission that [plaintiffs] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable," *Penn Central*, 438 U.S. at 130. Even a substantial reduction in the property's value is not sufficient to establish a "taking." *Id.* at 131 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)) (75 percent diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5 percent diminution in value). Plaintiffs have not alleged that the Landmarks Ordinance has deprived them of all reasonable and beneficial use of or return from the subject property, and mere disappointed expectations do not amount to an unconstitutional "taking."[8] Defendants' motions to dismiss plaintiffs' "takings" claims are granted.

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[8] Because plaintiffs' "takings" claims are dismissed for failure to state a claim, the court does not consider defendants' argument

Denial of Equal Protection

Plaintiffs allege that the Landmarks Ordinance facially violates the Equal Protection Clause of the Fourteenth Amendment. Second Complaint at ¶ 23(g). The court disagrees. A classification that does not impinge a fundamental right or disadvantage a "suspect class" will be upheld if it bears a rational relation to a legitimate state interest. *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Sklar v. Byrne*, 727 F.2d 633, 636 (7th Cir. 1984). Plaintiffs have not alleged that the Landmarks Ordinance bears no rational relation to the legitimate goal of preserving Chicago's historic buildings. *See Penn Central*, 438 U.S. at 134 (landmark preservation is legitimate public goal). The court grants defendants' motion to dismiss plaintiffs' claims that the Landmarks Ordinance facially violates the equal protection clause.[4]

Plaintiffs allege that the designation ordinance denies them equal protection because it groups seven noncontiguous buildings into the "Seven Houses District," and designates every facade of every building in the district as "protected," while other designation ordinances "landmark" only those portions of the buildings which can be

that plaintiffs' failure to pursue a state court inverse condemnation action renders the claims "unripe" for adjudication.

[4] Plaintiffs also allege that the Landmarks Ordinance facially violates equal protection by excluding religious organizations' church buildings from the Landmarks Ordinance without exempting other not-for-profit organizations. First Complaint at ¶ 16(d). Where, as here, the ordinance does not discriminate among religious organizations, exempting the church buildings of religious organizations will not trigger strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (upholding religious employers' exemption from Title VII). Exempting churches from the Landmarks Ordinance seems rationally related "to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."

seen from the public way. Plaintiffs allege further that the Commission denied them equal protection and due process by permitting other owners within the "Seven Houses" district to demolish parts of existing buildings and erect substantial additions. First Complaint at ¶¶ 16(f), (g). Plaintiffs argue that the Commission's actions were designed solely to stop their proposed development. First Complaint at ¶ 16(g).

Although it is true that uneven enforcement of a law does not violate the Constitution where, as here, the enforcement decisions are not based on "impermissible grounds . . . such as race, religion, or exercise of constitutional rights," *Jarrett v. United States*, 822 F.2d 1438, 1443 (7th Cir. 1987), plaintiffs appear to allege more than "selective prosecution." Plaintiffs are entitled to try to prove that the Commission unjustly singled their properties out (through a combination of executive and legislative action) for unique treatment. *See Falls v. Town of Dyer*, 875 F.2d 146, 148 (7th Cir. 1989). If the properties were singled out, and they are not a legitimate "class," plaintiffs may have a constitutional claim. *Id.* Accordingly, defendants should answer the allegations in ¶¶ 16(f) and (g) of the First Complaint.

Deprivations of Due Process[5]

Plaintiffs argue that, on its face, the Landmark[s] Ordinance denies due process by authorizing the Commission to preliminarily designate property as a "landmark" without affording the owners notice and an opportunity to object *before* the preliminary designation is applied. First Complaint at ¶ 16(a). However, as defendants note, property owners are entitled to written notice of any pre-

[5] In their second complaint, plaintiffs allege only that the Landmarks Ordinance is constitutionally invalid, both on its face and as applied, because it deprives property owners and plaintiffs of their property without due process of law in violation of the Fourteenth Amendment. Second Complaint at ¶¶ 23(a), (f). These allegations are conclusory and insufficient to state a claim for relief.

liminary determination, Chicago, Ill., Municipal Code, § 2-120-650, and a public hearing on the merits of such a determination, Chicago, Ill., Municipal Code, § 2-120-800. Plaintiffs fail to allege how these procedures were insufficient to safeguard their constitutional rights. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("meaningful postdeprivation process" can satisfy due process clause). The court grants defendants' motions to dismiss plaintiffs' allegations that the Landmarks Ordinance facially denies procedural due process to property owners.

Plaintiffs argue further that the Commission denied them due process by refusing to consider evidence of their proposed redevelopment. First Complaint at ¶¶ 16(i)-(k). Plaintiffs contend that the Commissions' Rules and Regulations required it to consider the redevelopment evidence, and its failure to do so deprived plaintiffs of a fair hearing. The court disagrees. The Rules and Regulations state two conditions that must be satisfied before a demolition permit will be granted: (1) the property proposed for demolition does not contribute to the character of the district, and (2) the proposed redevelopment is approved by the Commission.[6] The Commission's refusal to consider plaintiffs' redevelopment evidence was entirely justified, given its conclusion that the property proposed for demolition contributed to the character of the

[6] The Commission's Rules and Regulations provide in pertinent part:

> The Commission will consider allowing the demolition of such non-contributing improvements within designated districts based on the following two conditions: (1) the property proposed for demolition is deemed to be non-contributing to the character of the district, and its removal will not have a negative effect on the character of the district; *and* (2) the proposed redevelopment of the property is reviewed and approved by the Commission . . . .

Rules and Regulations, Article IV, Section C (emphasis added).

"Seven Houses District." Defendants' motions to dismiss plaintiffs' procedural due process allegations are granted.

Plaintiffs allege further that the Commission denied them a fair hearing by conducting the proceedings in a biased and adversarial manner. First Complaint at ¶¶ 16(h)(iii), (iv). As defendants note, an administrative agency may act as both an investigatory and adjudicatory body during the course of proceedings without violating due process. *Withrow v Larkin*, 421 U.S. 35, 56 (1975). Plaintiffs have not alleged specific incidents that demonstrate bias. The court should not be asked to comb the administrative record to locate evidence of bias. Plaintiffs will be granted time to amend their complaint to allege specific incidents of bias.

CONCLUSION[7]

Defendants' motions to dismiss plaintiffs' complaints are granted in part and denied in part.

[7] The court reserves ruling on defendants' motions to dismiss plaintiffs' pendent state claims pending resolution of plaintiffs' federal claims, except to deny those portions of defendants' motions which argue that plaintiffs' state administrative review claims should be dismissed for failure to name all necessary parties as defendants. Defendants contend that plaintiffs should have named as defendants all persons who filed written appearances at the public hearings. This argument is untenable. The Illinois Administrative Review Law requires only that an "administrative agency and all persons, other than the plaintiff, who were *parties of record* to the proceedings before the administrative agency shall be made defendants." Ill. Rev. Stat. ch. 110, ¶ 3-107 (emphasis added). Defendants do not allege that plaintiffs failed to name as a defendant any party of record to the administrative proceedings, and they fail to cite any authority which requires naming non-parties as defendants. *See Community Mental Health Council, Inc. v. Dept. of Revenue*, 186 Ill. App.3d 73, 541 N.E.2d 1330, 1333 (1st Dist. 1989) (plaintiff in administrative review action not statutorily required to name as defendant an entity which was not a party of record to administrative proceedings).

The following claims are dismissed with prejudice, because it does not appear that the defects could be cured by amendment:

First Complaint (91 C 1587):

¶ 16(a) (Landmark[s] Ordinance facially denies procedural due process);

¶ 16(d) (religious exemption denies equal protection);

¶ 16(e) (designation ordinance effects unconstitutional "taking");

¶¶ 16(i-k) (Commission's refusal to consider redevelopment evidence denied due process).

Second Complaint (91 C 5564):

¶¶ 23(b), (g) (equal protection);

¶¶ 23(c), (h) ("takings");

¶ 23(k) (economic hardship standard denies due process).

The following claims are dismissed without prejudice:

First Complaint (91 C 1587):

¶¶ 16(h)(iii), (iv) (Commission bias).

Second Complaint (91 C 5564):

¶¶ 23(a), (f) (due process).

Plaintiffs may have until January 31, 1992, to amend these claims in accordance with this opinion.[8]

Defendants' motions to dismiss the allegations in plaintiffs' First Complaint, ¶¶ 16(f) and (g) are denied. Defendants should answer these allegations by January 31, 1992.

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[8] The amended claims can be consolidated in one amended complaint.

DATED: January 10, 1992

ENTER: /s/ John F. Grady
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted)

PLAINTIFFS' FIRST AMENDED CONSOLIDATED COMPLAINT FOR ADMINISTRATIVE REVIEW

Pursuant to the Memorandum Opinion and Order entered in January 10, 1992 and the Order of January 29, 1992, Plaintiffs, by their attorneys, for their First Amended Consolidated Complaint in Causes Nos. 91 C 1587 and 91 C 5564 against defendants, state as follows:

Parties

1. Plaintiffs the International College of Surgeons and the United States Section of the International College of Surgeons (collectively, the "College") are not-for-profit corporations which were organized and are existing under the laws of the District of Columbia and which maintain their principal offices in Chicago, Illinois.

2. Plaintiff Robin Construction Corporation ("Robin") is a corporation, licensed and authorized to do business in the State of Illinois, which is engaged in the real estate development business, including the development and construction of multiple-family dwelling buildings.

3. Defendant the City of Chicago (the "City" or "Chicago") is a municipal corporation, organized and operating pursuant to the laws of the State of Illinois in the County of Cook.

4. Defendant Commission on Chicago Landmarks (the "Commission") is an administrative agency which was created by an ordinance adopted by the City Council of the City of Chicago (the "City Council") on March 11, 1987 (Municipal Code of Chicago, Chapter 21, Sections

21-62 through 21-95) (the "Landmarks Ordinance") and which is authorized to make final decisions within the meaning of the Illinois Administrative Review Law, Ill. Rev.Stat. ch. 110, ¶¶ 3-101 *et seq.*

5. Defendant Peter C.B. Bynoe was the Chairman, and defendants Irving J. Markin, Thomas E. Gray, John W. Baird, Josue Gonzales, Amy R. Hecker, David R. Mosena, [Marian] Despres, Charles Thurow, and Charles Smith were the other members, of the Commission, and all acted together as the Commission, at all times relevant herein.

6. Defendant Daniel W. Weil was, at all times relevant herein, the Commissioner of the Department of Buildings of the City of Chicago (the "Department of Buildings"), which official is designated by the Municipal Code of Chicago as having responsibility for the issuance of demolition and building permits.

Jurisdiction and Venue

7. This Court has jurisdiction of these actions pursuant to 28 U.S.C. § 1331, in that certain of the claims asserted herein arise under the Constitution of the United States and the other claims asserted herein are subject to this Court's pendent jurisdiction.

8. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(b), in that the defendants reside, the property that is the subject of these actions is situated, and the events giving rise to the plaintiffs' claims occurred, in this judicial district.

Facts

9. The College is an organization formed in 1935 which now consists of approximately 14,000 surgeons who practice surgery in 108 countries. The College was determined to be exempt from Federal Income Taxes, as charitable organizations pursuant to Section 501(c)(3) of the Internal Revenue Code, by the Internal Revenue

Service. The College's purpose and mission is to advance the art and science of surgery by bringing together surgeons of recognized performance caliber of all nations. To fulfill this mission, the College sponsors programs and publications which inform surgeons throughout the world about advances in surgery. For surgeons practicing in poorer countries, the College is the organization that provides their primary source of information concerning advances in surgery. Since 1957, the College has been and continues to be a non-governmental organization in official relations with the World Health Organization in the field of surgery. The College regularly sends surgical teams to "Third-World Countries" to perform needed surgery on the citizens of such countries and provides training to practicing surgeons in such countries.

10. Plaintiffs the International College of Surgeons and the United States Section of the International College of Surgeons, are, and have been for more than 40 years, the owners, as tenants-in-common, of two contiguous parcels of real estate which are commonly known as 1516-1524 North Lake Shore Drive, Chicago, Illinois (the "Subject Property").

11. The Subject Property is improved with two four-story buildings, in which the College maintains its administrative headquarters and operates a public museum named the International Museum of Surgical Science and Hall of Fame (the "Museum"), and two coach houses.

12. Since at least 1966, the College has contemplated developing the Subject Property, and has from time to time since then considered plans and proposals for the development of the Subject Property with a luxury high-rise residential building to be developed in conjunction with the College's continued used of a portion of the new building for its offices and the Museum.

13. The Subject Property is the principal asset of the College, and the development of the Subject Property has

for many years been planned and considered as the principal way of converting this non-income generating asset into a source of funds which is essential to the continued operation of the College and expansion of its mission and purpose.

14. During its planning and consideration of the development of the Subject Property, the College has relied upon the fact that the ordinance and regulations of the City of Chicago have at all times, until the enactment of the Designation Ordinance (described herein in paragraph 23) permitted the construction of a high-rise residential building on the Subject Property.

15. If the College is prohibited from developing the Subject Property in the manner described herein, the College will be unable to continue to occupy the premises because it is financially incapable of acquiring the substantial funds needed to make the repairs and renovation the buildings now require. The buildings have had no substantial improvements to their electrical, plumbing, heating or structural features and systems since they were originally constructed over eighty years ago.

16. If the College is prohibited from developing the Subject Property in the manner described herein, the College will be effectively deprived of its long-term expectation of being able by the development of the Subject Property to obtain the funds it needs to continue its programs and mission, and it will be deprived of the use and benefit of its principal asset.

17. The eastern frontage of the Subject Property adjoins North Lake Shore Drive. To the east of North Lake Shore Drive are the Outer Drive and the Chicago Lakefront. The property immediately to the south of the Subject Property, 1500 North Lake Shore Drive, is improved with a 23-story multiple-family dwelling building. The area west of the Subject Property is improved with a number of high-rise multiple-family dwelling buildings, including 1515 North Astor Street, which is improved

with a 21-story multiple-family dwelling building, and 1555 North Astor Street, which is improved with a 48-story multiple-family dwelling building. The property immediately north of the Subject Property, 1530 North Lake Shore Drive, is improved with a four-story building which is owned and used by the Government of Poland as a consulate. Immediately north of the Polish Consulate, at 1540 and 1550 North Lake Shore Drive, are 16-story and 33-story multiple-family dwelling buildings, respectively. The areas north, south, and west of the Subject Property are developed principally with luxury multiple-family dwelling buildings, and such has been the trend of development in the area surrounding the Subject Property for many years, and such development has been and continues to be permitted, except for the properties included in the Seven House District.

18. As a continuation of the College's long-term plan to develop the Subject Property, the College in January 1988 commenced negotiations with Clark Johnson for the possible development and sale of that Property. The negotiations continued until February 1989, at which time the College entered into a contract for the sale and redevelopment of the Subject Property (the "Contract"), pursuant to which the College will receive the sum of $17 million, subject to certain adjustments, plus the grant of a condominium consisting of 20,000 square feet for its offices and museum and the granting of $1 million for the restoration and renovation of its retained space in the existing buildings.

19. Thereafter, the plaintiff Robin acquired the controlling interest in the Contract and became the entity principally responsible for planning, executing and financing the redevelopment of the Subject Property.

20. The redevelopment of the Subject Property which is contemplated under the Contract (the "Proposed Development") would consist of the restoration of the easternmost 40 feet of the two existing four-story buildings, the demolition of the remainder of those buildings and the two existing coach houses, and the construction in their place of a 71-unit residential condominium building. Under the Proposed Development, the College's administrative offices and the Museum would be retained at the Subject Property.

21. The Proposed Development has been specifically and carefully designed by architects and preservation consultants to provide a building which would be consistent with and complementary to the buildings surrounding the Subject Property. The portions of the two existing four-story buildings on the Subject Property which would be preserved under the Proposed Development would retain any architecturally significant features which can be seen from the public way. The Proposed Development would preserve and maintain all of the supposed "critical features" of the Subject Property.

22. The Proposed Development was permissible and legal (subject to compliance with the applicable provisions of the Lake Michigan and Chicago Lakefront Protection Ordinance and Chicago Zoning Ordinance, which could be achieved) at the time the College acquired the Subject Property; when it initially decided to develop that Property; when it commenced the negotiations leading up to the execution of the Contract; and, plaintiffs maintain, when it executed the Contract; since, as of February 1989, the Subject Property had not been designated as a landmark by the City.

23. On June 28, 1989, the City Council, pursuant to the Landmarks Ordinance and the recommendation of the Commission, enacted an ordinance (the "Designation Ordinance") which designated the Subject Property and five other properties as a landmark district (the "Seven House District"). The inclusion of the Subject Property within the Seven House District was made over the objection of the College.

24. On or about October 5, 1990, the plaintiffs filed with the Department of Buildings four applications for permits to demolish certain portions of the rear of the two main buildings and the coach houses on the Subject Property, pursuant to the Proposed Development (the "Development Applications"). Pursuant to the Landmarks Ordinance, the Department of Buildings referred the Development Applications to the Commission on October 10, 1990.

25. On October 23, 1990, the Commission issued its preliminary decision denying the Development Applications.

26. On November 6, 1990, pursuant to the plaintiffs' request under Section 21-82 of the Landmarks Ordinance, the Commission held an informal conference with the plaintiffs. The Commission and the plaintiffs were unable to reach an accord at that conference or at any time thereafter.

27. On December 18, 1990, a public hearing was held before the Commission on the Development Applications. At that hearing, the plaintiffs presented evidence to show that the Development Applications should be approved and issued.

28. On January 9, 1991, the Commission rendered a final administrative decision disapproving the Development Applications (the "Development Applications Decision"). A copy of the Development Applications Decision was attached hereto as Exhibit A.

29. The Landmarks Ordinance contains, in Section 21-86, a provision which permits an owner of property whose application for a demolition permit has been denied the opportunity to file an "Economic Hardship Application."

30. On February 8, 1991, pursuant to Section 21-86 of the Landmarks Ordinance, the plaintiffs filed an application for an economic hardship exception (the "Hardship Application") with the Commission.

31. On March 5 and 7 and May 7 and 8, 1991, public hearings were held before the Commission on the Hardship Application. At those hearings, the plaintiffs offered evidence to show that the Hardship Application should be granted.

32. On July 3, 1991, the Commission issued its decision denying the Hardship Application (the "Hardship Application Decision"). A copy of the Hardship Application Decision was attached hereto as Exhibit A.

33. The Development Application Decision and the Hardship Application Decision (collectively, the "Decisions") are final administrative decisions which adversely affect the legal rights of the plaintiffs, and terminated the proceedings before the Commission.

34. The plaintiffs timely filed in the Circuit Court of Cook County, Illinois, their Complaints for Administrative Review under the Illinois Administrative Review Law seeking the judicial review of the Decisions, because the Decisions are contrary to law for the reasons set forth herein below.

A. Economic Hardship Standard Is Unconstitutional On Its Face.

35. The standard for granting an economic hardship exception which is contained in the Landmarks Ordinance requires that the designation of a property as a landmark must result in "the loss of all reasonable and beneficial use of or return from the property."

36. That standard excludes from consideration the elements of the interference of the landmarking with the reasonable investment-backed expectations of the property-owner and the character of the landmark designation, which factors must be considered in determining whether

the landmark designation constitutes a taking of property without just compensation.

37. That standard improperly states the element of the economic effect of the landmark designation upon the value of the affected property, which also must be considered in determining whether the landmark designation constitutes a taking of property without just compensation.

38. For these reasons, the economic hardship exception standard in the Landmarks Ordinance is confiscatory in nature and is invalid on its face.

B. The Ordinance As Applied To The Subject Property Constitutes A Taking of Plaintiffs' Property.

39. By precluding the Proposed Development, the Designation Ordinance and the Decisions have prevented the College from developing the Subject Property in the manner it has intended for years prior to the enactment of the Designation Ordinance, and realizing the greatly enhanced value of the Subject Property which would be attendant to the Proposed Development and have thereby greatly diminished the value of the Subject Property, and have prevented the College from making any reasonable or economically viable use of the Subject Property.

40. By precluding the Proposed Development, the Designation Ordinance and the Decisions have interfered with and prevented the College from realizing its reasonable investment-backed expectations for the Subject Property, because the College had planned the Proposed Development and entered into the Contract prior to the enactment of the Designation Ordinance.

41. The defendants have not offered to compensate the College in any amount or manner for the reduction in value and the restriction on the College's right to use and develop the Subject Property which was caused by the Designation Ordinance and the Decisions.

42. The Designation Ordinance and the Decisions constitute a taking of the Subject Property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 15 of the Illinois Constitution.

C. The Designation Ordinance Is Arbitrary and Capricious and Denies Plaintiffs Due Process and Equal Protection.

43. The Designation Ordinance included and incorporated into a single Seven House District various buildings which are located on seven non-contiguous properties and which lack common characteristics or features.

44. The Designation Ordinance excluded from the Seven House District various buildings on properties which are located in between the various buildings which comprise that District and which possess landmark characteristics which are equal to or greater than the landmark characteristics of the buildings which were included within that District.

45. The Designation Ordinance designated every facade of every building in the Seven House District as being protected by the landmark designation. By contrast, the normal practice of the City Council, as evidenced by its creation of numerous other landmark districts, is to designate as landmarks only those portions of the buildings within those landmark districts which can be seen from the public right-of-way. The landmark designation of every facade of every building, contrary to the Commission's usual practice, was made notwithstanding the statement of the Commission's professional staff that the only "critical features" of the buildings in the Seven House District were those portions of those buildings which are visible from the public way.

46. The Designation Ordinance is arbitrary, capricious, and irrational in nature and is not substantially related to

a legitimate public purpose, and therefore violates the plaintiffs' rights to substantive due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 2 of the Illinois Constitution.

47. The arbitrary, capricious, and discriminatory nature of the Designation Ordinance, as described in paragraphs 43-45 of the Amended Complaint, causes the Designation Ordinance to constitute a denial of the plaintiffs' rights to the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 2 of the Illinois Constitution.

D. The Commission Denied Plaintiffs Procedural Due Process.

48. Section 21-67 of the Landmarks Ordinance authorizes the Commission to issue a preliminary designation of private property as a landmark, thereby preventing the owner of such property from demolishing existing structures or constructing new structures on such property which otherwise would be permissible under applicable ordinances and regulations, without providing the owner with notice or the opportunity for a hearing prior to such a preliminary designation. In addition, the Landmarks Ordinance permits such a preliminary designation to remain in full force and effect without providing the owner of such property with notice or the opportunity for a hearing for an indefinite and indeterminate period of time, the length of which period is at the sole discretion of the Commission.

49. The Commission made its preliminary determination that the Subject Property should be included in the Seven House District without first affording the College an opportunity to describe its investment expectations, a matter that the Commission was required to consider before mailing such preliminary determination.

50. Upon learning of the Proposed Development, and in its consideration of the Development Applications and the Hardship Application, the Commission engaged in a course of conduct which was designed to foreclose any possible redevelopment of the Subject Property and acted in a biased and adversarial manner toward the plaintiffs, thereby denying the plaintiffs a fair and impartial consideration of the Development Applications and the Hardship Application. Among the acts of the Commission which demonstrate its biased attitude toward the Proposed Development and the plaintiffs are the following:

A. Although the Commission's staff originally recommended to the Commission that the creation of the Seven House District preserve as landmarks only those portions of the buildings which were being recommended for inclusion in that proposed District which could be seen from the public way, the Commission recommended to the City Council that the creation of the Seven House District preserve as landmarks all of the exterior facades of all of the structures and all of the "streetscapes" within the boundaries of that proposed District, thereby precluding the Proposed Development.

B. The proceedings which were conducted at the informal conference which was held on November 6, 1990 demonstrate the hostility of the Commission to the plaintiffs and the Proposed Development.

C. The Commission retained two expert witnesses to testify in opposition to the Development Applications.

D. The Commission denied the plaintiffs' request to file a memorandum in support of the Development Applications.

E. On January 9, 1991, the Commission rejected the plaintiffs' applications and requests to amend the Designation Ordinance while denying the plaintiffs' request to present evidence in support of those applications and requests.

F. At the Commission's hearing on January 9, 1991, the Chairman proposed a motion to deny the Development Applications which contained no findings of fact, in violation of Section 21-83 of the Landmarks Ordinance. When the plaintiffs pointed out that deficiency in the motion, the Chairman moved to amend that motion by adding thereto certain findings of fact which previously had been distributed to the Commission but which had not been disclosed to the plaintiffs before (and were not disclosed to the plaintiffs at) that hearing. The Commission then adopted verbatim those findings of fact and approved the Chairman's motion as amended with no discussion or analysis.

G. At the hearing on the Development Applications which was held on December 18, 1990, the Commission refused to permit the plaintiffs to introduce evidence or make an offer of proof concerning the Proposed Development, in violation of Article IV, Section C of the Commission's Rules and Regulations.

51. The effect of the Landmarks Ordinance as applied and the actions of the Commission constitute a deprivation of the plaintiffs' rights to procedural due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 2 of the Illinois Constitution.

E. The Designation Ordinance Constitutes Special Legislation.

52. The arbitrary, capricious, and irrational nature of the Seven House Distirct, as described in paragraphs 43-45 of the Amended Complaint, causes the Designation Ordinance to constitute impermissible special legislation, in violation of Article 4, Section 13 of the Illinois Constitution.

F. The Landmarks Ordinance Delegates Legislative Power To The Commission Without Sufficient Criteria.

53. The Landmarks Ordinance delegates to the Commission the legislative powers to designate landmark districts and to decide demolition permit and economic hardship applications without providing the Commission with sufficient criteria to be applied in exercising such delegated powers, in violation of the separation of powers doctrine set forth in Article 2, Section 1 and Article 4, Section 1 of the Illinois Constitution.

G. The Plaintiffs Have A Vested Right To Proceed With the Proposed Development.

54. In reliance on the existing zoning and other land use regulations affecting the use and development of the Subject Property, and in reasonable reliance on the issuance of all necessary permits, Plaintiffs entered into the Contract for the sale and development of the Subject Property and expended substantial sums which gave them a vested right in the continuance of the existing zoning and land use regulation which entitles them to proceed with the Proposed Development notwithstanding the enactment of the Designation Ordinance.

H. The Commission Decision Is Illegal For The Following Additional Reasons.

55. The Decisions, and the findings of fact contained therein, are not supported by substantial evidence in the administrative records.

56. The Decisions, and the findings of fact contained therein, improperly are based upon information which is outside of the administrative records.

57. The Decisions, and the findings of fact contained therein, are contrary to the manifest weight of the evidence in the administrative records.

58. The Commission failed to make findings of fact which are legally sufficient to support the Decisions.

59. The Decisions are based upon criteria contained in the Commission's Rules and Regulations which were neither authorized or approved by the City Council nor contained in the Landmarks Ordinance and which are fatally vague and indefinite.

60. The Decisions improperly are not based upon the applicable criteria contained in the Landmarks Ordinance.

61. The Decisions are contrary to law.

62. Pursuant to Ill.Rev.Stat. ch. 110, ¶ 3-108, plaintiffs demand that the entire transcripts of evidence taken at the public hearings on December 18, 1990, March 5 and 7, and May 7 and 8, 1991, including all exhibits and the Commission's transcripts and minutes of its meetings held on January 9 and July 3, 1991, be filed by the Commission as part of the record in these cases.

WHEREFORE, plaintiffs request that the Court:

1. Declare the Landmarks Ordinance and the Designation Ordinance to be unconstitutional, both on their faces and as applied to the Subject Property;

2. Declare the actions of the Commission, in its consideration of the Development Applications and the Hardship applications, to be unconstitutional;

3. Declare the Decisions to be unconstitutional, null and void, and of no legal force and effect; and

4. Grant the plaintiffs such other and further relief as the Court deems appropriate.

INTERNATIONAL COLLEGE OF SURGEONS,
UNITED STATES SECTION OF THE
INTERNATIONAL COLLEGE OF SURGEONS,
and ROBIN CONSTRUCTION CORPORATION

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Article XVII. Commission on Chicago Historical and Architectural Landmarks

2-120-580 Purpose of provisions.

It is hereby declared necessary for the general welfare of the citizens of the city of Chicago as an exercise of the home rule authority of the city of Chicago under Article VII, Section 6, of the Illinois Constitution, to protect and encourage the continued utilization of areas, districts, places, buildings, structures, works of art, and other similar objects within the city of Chicago eligible for designation by ordinance as "Chicago Landmarks." The purpose of these sections is the following:

1. To identify, preserve, protect, enhance, and encourage the continued utilization and the rehabilitation of such areas, districts, places, buildings, structures, works of art, and other objects having a special historical, community, architectural, or aesthetic interest or value to the city of Chicago and its citizens;

2. To safeguard the city of Chicago's historic and cultural heritage, as embodied and reflected in such areas, districts, places, buildings, structures, works of art, and other objects determined eligible for designation by ordinance as "Chicago Landmarks";

3. To preserve the character and vitality of the neighborhoods and central area, to promote economic development through rehabilitation, and to conserve and improve the property tax base of the city of Chicago;

4. To foster civic pride in the beauty and noble accomplishments of the past as presented in such "Chicago Landmarks";

5. To protect and enhance the attractiveness of the city of Chicago to homeowners, home buyers, tourists, visitors, businesses and shoppers, and thereby to support and promote business, commerce, industry, and tourism and to provide economic benefit to the city of Chicago;

6. To foster and encourage preservation, restoration, and rehabilitation of areas, districts, places, buildings, structures, works of art, and other objects, including entire districts and neighborhoods, and thereby prevent future urban blight and in some cases reverse current urban deterioration;

7. To foster the education, pleasure, and welfare of the people of the city of Chicago through the designation of "Chicago Landmarks";

8. To encourage orderly and efficient development that recognizes the special value to the city of Chicago of the protection of areas, districts, places, buildings, structures, works of art, and other objects designated as "Chicago Landmarks";

9. To encourage the continuation of surveys and studies of Chicago's historical and architectural resources and the maintenance and updating of a register of areas, districts, places, buildings, structures, works of art, and other objects which may be worthy of landmark designation; and

10. To encourage public participation in identifying and preserving historical and architectural resources through public hearings on proposed designations, building permits, and economic hardship variations. (Prior code § 21-62; Added. Coun. J. 3-11-87, p. 40272)

2-120-590 Commission—Creation, composition and officers.

There is hereby created a commission on Chicago landmarks. The commission shall consist of nine members, eight of whom shall be appointed by the mayor by and with consent of the city council of the city of Chicago. The ninth member shall be the commissioner of planning and development or his designee. The members shall serve without compensation. One of the members shall be designated by the mayor as chairman, another as vice-chairman, and another as secretary. For the purposes of this Article XVII, the "commission" means the com-

mission on Chicago landmarks. (Prior code § 21-63; Added. Coun. J. 3-11-87, p. 40272; Amend. 6-22-88, p. 14547; 12-11-91, p. 10936)

2-120-600 Commission membership and meetings.

A majority of the members of the commission shall constitute a quorum. The commission shall meet on the call of the chairman or of four of its members. The term of each member shall be for four years and until a successor is appointed. No more than four members shall be replaced in a one-year period. Commission members shall be selected from professionals in the disciplines of history, architecture, historic architecture, planning, archaeology, real estate, historic preservation, or related fields, or shall be persons who have demonstrated special interest, knowledge, or experience in architecture, history, neighborhood preservation, or related disciplines. (Prior code § 21-64; Added. Coun. J. 3-11-87, p. 40272)

2-120-610 Commission—Powers and duties.

The commission shall have and may exercise the following duties, powers, and responsibilities:

1. To conduct an ongoing survey of the city of Chicago for the purpose of identifying those areas, districts, places, buildings, structures, works of art, and other objects of historic or architectural significance;

2. To hold hearings and to recommend that the city council designate by ordinance areas, districts, places, buildings, structures, works of art, and other objects as official "Chicago Landmarks," if they qualify as defined hereunder, and to recommend that such designation include all or some portion of the property or any improvements thereon;

3. To cause plaques to be manufactured and installed that identify the significance of designated landmarks and landmark districts;

4. To prepare and publish maps, brochures, and other descriptive and educational materials about Chicago's

landmarks and landmark districts and their designation and protection;

5. To review permit applications for alteration, construction, reconstruction, erection, demolition, relocation, or work of any kind affecting landmarks and structures or unimproved sites in landmark districts and to require the presentation of such plans, drawings, elevations, and other information as may be necessary to review those applications;

6. To advise and assist owners or prospective owners of designated or potential landmarks or structures in landmark districts on technical and financial aspects of preservation, renovation, rehabilitation and reuse, and to establish standards and guidelines therefor;

7. To apply for and accept any gift, grant, or bequest from any private or public source, including agencies of the federal or state government, upon approval by the city council, for any purpose authorized by these provisions;

8. To make recommendations to the city council concerning means to preserve, protect, enhance, rehabilitate and perpetuate landmarks and structures in landmark districts;

9. To adopt, publish, and make available rules of procedure and other regulations for the conduct of commission meetings, hearings, and other business;

10. To prepare and present nominations of landmarks and historic districts to any state or federal registers of historic places;

11. To assume whatever responsibility and duties may be assigned to it by the state under Certified Local Government provisions of the National Historic Preservation Act of 1966, as amended;

12. To cooperate with and enlist the aid of persons, organizations, corporations, foundations, and public agencies in matters involving historic preservation, renovation, rehabilitation and reuse;

13. To advise any city department or agency concerning the effect of its actions, programs, capital improvements or activities on designated or potential landmarks;

14. To consider whether denial of permits affecting landmarks and structures or unimproved sites in landmark district results in economic hardship to property owners;

15. To exercise any other power or authority necessary or appropriate to carry out the purpose of these provisions. (Prior code § 21-65; Added. Coun. J. 3-11-87, p. 40272)

2-120-620 Landmarks—Criteria for designation.

The commission shall familiarize itself with areas, districts, places, buildings, structures, works of art, and other objects within the city of Chicago which may be considered for designation by ordinance as "Chicago Landmarks," and maintain a register thereof. In making its recommendation to the city council for desigation, the commission shall limit its consideration solely to the following criteria concerning such area, district, place, building, structure, work of art, and other objects:

1. Its value as an example of the architectural, cultural, economic, historic, social, or other aspect of the heritage of the city of Chicago, state of Illinois, or the United States;

2. Its location as a site of a significant historic event which may or may not have taken place within or involved the use of any existing improvements;

3. Its identification with a person or persons who significantly contributed to architectural, cultural, economic, historic, social, or other aspect of the development of the city of Chicago, state of Illinois, or the United States;

4. Its exemplification of an architectural type or style distinguished by innovation, rarity, uniqueness, or overall quality of design, detail, materials or craftsmanship;

5. Its identification as the work of an architect, designer, engineer, or builder whose individual work is significant in the history or development of the city of Chicago, the state of Illinois, or the United States;

6. Its representation of an architectural, cultural, economic, historic, social, or other theme expressed through distinctive areas, districts, places, buildings, structures, works of art, or other objects that may or may not be continguous;

7. Its unique location or distinctive physical appearance or presence representing an established and familiar visual feature of a neighborhood, community, or the city of Chicago. (Prior code § 21-66; Added. Coun. J. 3-11-87, p. 40272)

2-120-630 Landmarks—Preliminary determination.

The commission may, by resolution, make a preliminary determination that an area, district, place, building, structure, work of art, or other object meets one or more of the criteria for landmark designation. The commission shall send, by certified mail, return receipt requested, written notice of such determination to the owner of the property. The commission shall also notify in writing the alderman of each ward in which the property is located and all relevant city departments. (Prior code § 21-67; Added. Coun. J. 3-11-87, p. 40272)

2-120-640 Preliminary determination—Request for planning report.

Upon adoption of a resolution making a preliminary determination, the commission shall request a report from the commissioner of planning and development which evaluates the relationship of the proposed designation to the Comprehensive Plan of the city of Chicago and the effect of the proposed designation on the surrounding neighborhood. The report shall also include the commissioner's opinion and recommendation regarding any other plan-

ning consideration relevant to the proposed designation and the commissioner's recommendation of approval, rejection or modification of the proposed designation. The report shall be submitted to the commission within 60 days of the request, if the proposed designation is of an area, place, building, structure, work of art or other object, or within 90 days, if the proposed designation is a district, and shall become part of the official record concerning the proposed designation. The commission may make such modifications, changes and alterations concerning the proposed designation as it deems necessary in consideration of any recommendation of the commissioner of planning and development. If the commissioner declines or fails to submit a report within the time provided herein, the commission may proceed with designation. (Prior code § 21-68; Added. Coun. J. 3-11-87, p. 40272; Amend. 12-11-91, p. 10936)

2-120-650 Request for owner consent.

The commission shall thereafter, by certified mail return receipt requested, notify the owner of the property of the reasons for and effects of the proposed designation and request that the owner consent in writing to the proposed designation. The owner shall respond within 45 days from the date of mailing of the request. In the case of the proposed designation of an area, place, building, structure, work of art or other object, an owner may, within the 45-day period, request an extension of time, not to exceed 120 days, to submit a response. In the case of the proposed designation of a district, the alderman of a ward in which the district is wholly or partly located may, within the 45-day period, request an extension of time, not to exceed 120 days, for owners to submit responses. If the owner consents to designation, the commission shall notify the owner of its determination with respect to the proposed designation within 45 days after receipt of the owner's consent and shall forward its recommendation to the city council as provided in Section 2-

120-690. If the owner declines or fails to give written consent to the proposed designation within the time specified in this section, the commission shall schedule a public hearing on the proposed designation. (Prior code § 21-69; Added. Coun. J. 3-11-87, p. 40272)

2-120-660 Buildings owned or used by religious organizations.

No building that is owned by a religious organization and is used primarily as a place for the conduct of religious ceremonies shall be designated as a historical landmark without the consent of its owner. (Prior code § 21-69.1; Added. Coun. J. 3-11-87, p. 40272)

2-120-670 Public hearing—Notice requirements.

Prior to conducting a public hearing under this Chapter 2-120, the commission shall give written notice of the date, time, and place of the hearing to any owner of the subject property. The commission shall also cause to be posted, for a period of not less than 15 days immediately preceding the hearing, a notice stating the time, date, place, and matter to be considered at the hearing. The notice shall be prominently displayed on the place, building, object or structure, or on the public ways abutting the property, and, in the case of designation of areas or districts, the notices shall be placed on the principal boundaries thereof. In addition, not less than 15 days prior to the hearing, the commission shall cause a legal notice to be published in a newspaper of general circulation in the city of Chicago setting forth the nature of the hearing, the property, area, or district involved, and the date, time, and place of the scheduled public hearing. (Prior code § 21-70; Added. Coun. J. 3-11-87, p. 40272)

2-120-680 Public hearing—Presentation of evidence.

The commission shall provide a reasonable opportunity for all interested persons to present testimony or evidence

under such rules as the commission may adopt governing the proceedings of a hearing. At the hearing, each speaker shall state his name, address, and the interest which he represents. The hearing may be continued to a date certain, and a transcript and record shall be kept of all proceedings. A person, organization, or other legal entity whose use or whose members' use or enjoyment of the area, district, place, building, structure, work of art or other object proposed for designation may be injured by the designation or the failure of the commission to recommend designation, may become a party to a designation proceeding. Any person, organization, or other legal entity whose use or enjoyment of the area, district, place, building, structure, work of art or other object designated as a landmark may be injured by the approval or disapproval of a proposed alteration, construction, reconstruction, erection, demolition or relocation of a proposed or designated landmark, may become a party to a permit application proceeding. The foregoing shall include, without limitation, persons, organizations or other legal entities residing in, leasing or having an ownership interest in real property located within 500 feet of the property line of the proposed or designated landmark or within the proposed or designated landmark district. (Prior code § 21-71; Added. Coun. J. 3-11-87, p. 40272)

2-120-690 Commission recommendation following hearing.

Within 30 days after the conclusion of the public hearing, the commission shall determine whether to recommend the proposed landmark designation to the city council. If the commission makes a determination to recommend a designation to the city council, it shall set forth its recommendation in writing, including finding of fact relating to the criteria for designation in Section 2-120-620 that constitute the basis for its decision and shall transmit its recommendation to the city council, to the owner of the property and to the parties appearing at

the public hearing. If 51 percent of the owners of the property in a district responding to the request for consent file written objections to designation, a recommendation of landmark designation of that district must be approved by the affirmative vote of six members of the commission. The commission shall also transmit to the city council the official record of its proceedings concerning the recommended designation. If the proposed designation is of an area, place, building, structure, work of art or other object, the commission shall transmit its recommendation to the city council within 180 days from the date of receipt of the report of the commissioner of planning and development, or if no report has been received, within 240 days from the date of the commission's request for the report. If the proposed designation is of a district, the commission shall transmit its recommendation to the city council within 240 days from the date of receipt of the report of the commisioner of planning and development, or, if no report has been received, within 330 days from the date of the commission's request for the report. If, however, an extension of time has been granted under Section 2-120-650, the time allowed for submission under this section shall be extended by the same number of days. (Prior code § 21-72; Added. Coun. J. 3-11-87, p. 40272; Amend. 12-11-91, p. 10936)

2-120-700 City council consideration of designation—Plaques.

The city council shall give due consideration to the findings, recommendations and record of the commission in making its determination with respect to the proposed designation of any area, district, place, building, structure, work of art or other object having a special historical, community, architectural, or aesthetic interest or value. The city council may, in its discretion, hold public hearings on any such recommended designation. The city council may by ordinance designate an area, district, place, building, structure, work of art or other object

meeting one or more of the criteria stated in Section 2-120-620 hereof as a "Chicago Landmark." The city council may direct that a suitable plaque or plaques be created by the commission appropriately identifying said landmark. The plaque may be affixed to private property only if the owner or owners consent in writing. (Prior code § 21-73; Added. Coun. J. 3-11-87, p. 40272)

2-120-710 Preservation easements for landmarks.

The commission may consider and recommend to the city council the adoption of a preservation easement for any designated landmark or for any building, area, district or place which meets the criteria for landmark designation. If an owner of any property proposes to the commission a preservation easement, the commission shall hold a public hearing on the proposal in accordance with Sections 2-120-670 and 2-120-680 prior to recommending that the city council accept the proposed easement. (Prior code § 21-74; Added. Coun. J. 3-11-87, p. 40272)

2-120-720 Landmarks—Notice of designation.

Immediately following official designation by the city council, the commission shall notify the department of buildings of the city of Chicago of the designation. The commission shall also, within 10 days of the official designation, send a certified copy of the ordinance designating the property and a summary of the effects of designation to the owner of the property by certified mail, return receipt requested. The commission shall also file with the recorder of deeds of Cook County, the assessor of Cook County, the division of maps and plats of the department of planning and development of the city of Chicago, and all other relevant city departments, a certified copy of the designation ordinance. (Prior code § 21-75; Added. Coun. J. 3-11-87, p. 40272; Amend. 9-13-89, p. 4604; 12-11-91, p. 10936)

2-120-730 Amendment, [rescission], and reconsideration of designation.

Any designation of an area, district, place, building, structure, work of art or other similar object as a "Chicago Landmark" shall only be amended or rescinded in the same manner and procedure as the original designation was made. If the commission votes not to recommend a proposed designation to the city council, or if the city council has refused to designate a proposed "Chicago Landmark," then the commission may reconsider such proposed designation only if the commission finds that a substantial change in circumstances has occurred or new information becomes available relative to the criteria set forth in Section 2-120-620. (Prior code § 21-76; Added. Coun. J. 3-11-87, p. 40272; Amend. 10-23-91, p. 6879)

2-120-740 Alteration, relocation or demolition of landmarks—Permit review requirements.

No permit for alteration, construction, reconstruction, erection, demolition, relocation, or other work, shall be issued to any applicant by any department of the city of Chicago without the written approval of the commission for any area, place, building, structure, work of art or other object for which the commission has made a preliminary determination of landmark status or which has been designated as a "Chicago Landmark" in the following instances: (1) where such permit would allow the alteration or reconstruction of or addition to any improvement which constitutes all or a part of a landmark or proposed landmark; or (2) where such permit would allow the demolition of any improvement which constitutes all or a part of a landmark or proposed landmark; or (3) where a permit would allow the construction or erection of any addition to any improvement or the erection of any new structure or improvement on any land within a landmark district; or (4) where a permit would allow the construction or erection of any sign or billboard within the

public view which may be placed on, in, or immediately adjacent to any improvement which constitutes all or part of any landmark or proposed landmark. Any city department which receives an application for a permit as defined in this section shall forward the application, including copies of all detailed plans, designs, elevations, specifications, and documents relating thereto, to the commission within seven days of receipt thereof. It shall be a violation of this ordinance for an owner to perform, authorize or allow work or other acts requiring review without a permit. (Prior code § 21-77; Added. Coun. J. 3-11-87, p. 40272)

2-120-750 Permit review—Preexisting work.

Erection, construction, reconstruction, alteration, or demolition work begun pursuant to a properly issued permit prior to a preliminary determination of landmark status shall not be subject to review by the commission unless such permit has expired, been canceled or revoked, or the work is not diligently proceeding to completion in accordance with the Chicago Building Code. (Prior code § 21-78; Added. Coun. J. 3-11-87, p. 40272)

2-120-760 Application for permit—Preliminary decision by commission.

Within 15 days of its receipt of an application for a permit, as defined in Section 2-120-740, the commission shall issue in writing a preliminary decision approving or disapproving the application and shall notify the applicant and the appropriate city department of its preliminary decision. (Prior Code § 21-79; Added. Coun. J. 3-11-87, p. 40272)

2-120-770 Application for permit—Preliminary approval by commission.

If the commission finds that the proposed work will not adversely affect any significant historical or architectural feature of the improvement or of the district, and is in accord with the Standards for Rehabilitation set forth by the United States Secretary of the Interior at 36 C.F.R. 67, as amended from time to time, as well as the commission's published procedures, the commission shall issue a preliminary approval of the application. Upon receipt of the commission's preliminary approval, the appropriate city department shall proceed in its usual manner with its own review of the application. No substantial change shall be made to the work proposed in the application for the permit after approval by the commission without resubmittal to the commission and approval thereof in the same manner as for the original application. (Prior code § 21-80; Added. Coun. J. 3-11-87, p. 40272)

2-120-780 Application for permit—Preliminary disapproval by commission.

If the commission finds that the proposed work will adversely affect or destroy any significant historical or architectural feature of the improvement or the district, or is inappropriate or inconsistent with the designation of the structure, area or district, or is not in accordance with the spirit and purposes of this ordinance, or does not comply with the Standards for Rehabilitation established by the Secretary of the Interior, the commission shall issue a preliminary decision disapproving the application for permit; provided, however, that if the construction, reconstruction, alteration, repair or demolition of any improvement could remedy conditions imminently dangerous to life, health or property, as determined in writing by the department of buildings, or the board of health, or the fire department, the commission shall approve the work notwithstanding other considerations relating to its designation as a "Chicago Landmark" or to the fact that the commission has made a preliminary determination of landmark status. (Prior code § 21-81; Added. Coun. J. 3-11-87, p. 40272; Amend. 9-13-89, p. 4604)

2-120-790 Preliminary disapproval—informal conference on alternative procedures.

Within 10 days after receiving the commission's notice of preliminary disapproval, the applicant for permit may request in writing an informal conference before the commission for the purpose of securing compromise regarding the proposed work so that the work will not, in the opinion of the commission, adversely affect any significant historical or architectural feature of the improvement or district and will be appropriate and consistent with the spirit and purposes of this ordinance. The commission shall hold such conference within 15 days after receipt of the request. The commission shall consider with the applicant every means for substantially preserving, protecting, enhancing and perpetuating the special historical or architectural feature of the improvement or district, including investigating the possibility of modifying the proposed work, the possibility of any alternative private use of the structure or structures that would substantially preserve its special features, and the possibility of public incentives for enhancing the use of the structure or structures or district involved. If the commission and the applicant for permit reach accord through the informal conference, the commission shall issue its approval of the application for permit as modified and so notify the applicant and the appropriate city departments in accordance with Sections 2-120-760 and 2-120-770. (Prior code § 21-82; Added. Coun. J. 3-11-87, p. 40272)

2-120-800 Application for permit—Public hearing.

If within 30 days after the conclusion of an informal conference under Section 2-120-790, the commission and applicant for permit have failed to reach accord or if the applicant fails to request an informal conference within 10 days of receiving notice as provided in Section 2-120-790, the commission shall hold a public hearing on the permit application in accordance with Sections 2-120-670

and 2-120-680. The public hearing shall be concluded within 90 days after the commission has disapproved the permit unless the applicant requests or agrees in writing to an extension of time. The commission shall, within 30 days after the conclusion of the hearing, issue a written decision approving or disapproving the permit application. The decision shall contain the findings of fact that constitute the basis for the decision consistent with the criteria in Section 2-120-740. The commission shall send written notice of its decision to the applicant by certified mail, return receipt requested, to the appropriate city departments, to all parties registered at the public hearing, and to the city council. (Prior code § 21-83; Added. Coun. J. 3-11-87, p. 40272)

2-120-810 Application for permit—Final commission decision.

The written decision of the commission approving or disapproving an application for a permit under Section 2-120-800 shall be on the date it issues a final administrative decision appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act, Illinois Revised Statutes, Chapter 110, Section 3-101 et seq. (1985). (Prior code § 21-84; Added. Coun. J. 3-11-87, p. 40272)

2-120-820 Expedited consideration of designation and permit.

Notwithstanding any other provision in this ordinance, if an owner of an area, parcel within a district, place, building, structure, work of art, or other object for which the commission has made a preliminary determination pursuant to Section 2-120-630 applies for a permit, and if the commission issues a preliminary disapproval of the application, pursuant to Sections 2-120-760 and 2-120-780, the commission shall schedule and conduct a public hearing on both the proposed designation and the application for permit and shall notify the city council of its

recommendations thereon within 90 days of the date the application for permit is received by the commission. If the commission fails to make its recommendation on designation to the city council within 90 days, then the application for the permit shall be deemed approved by the commission. If the commission submits its recommendation within 90 days and the city council does not pass an ordinance granting the proposed designation within 90 days after the recommendation of the commission, then the application for permit shall be deemed approved by the commission. (Prior code § 21-85; Added. Coun. J. 3-11-87, p. 40272)

2-120-830 Economic hardship exception—Application.

Upon final notification from the commission of its decision to deny an application for a permit to construct, reconstruct, alter, add to, demolish, or relocate property given a preliminary determination of landmark status or designated a "Chicago Landmark," the applicant may within 30 days apply to the commission for an economic hardship exception on the basis that the denial of permit will result in the loss of all reasonable and beneficial use of or return from the property. The commission shall develop regulations that describe factors, evidence and testimony that will be considered by the commission in making its determination. (Prior code § 21-86; Added. Coun. J. 3-11-87, p. 40272)

2-120-840 Economic hardship exception—Public hearing.

The commission shall schedule and hold a public hearing on the application for an economic hardship exception within 30 days from receipt of the application. Notice of the date, time, place and subject matter of the hearing shall be provided in accordance with Section 2-120-670 and, in addition, shall be provided in writing to all persons who presented testimony at the public

hearing on the permit application under Section 2-120-800. The hearing shall be concluded within 90 days after the application for exception has been received by the commission. All interested persons shall be allowed to participate in the hearing as provided in Section 2-120-680. The commission or the hearing officer may solicit expert testimony or relevant information from the applicant. A record of the proceedings shall be kept by the commission. (Prior code § 21-87; Added. Coun. J. 3-11-87, p. 40272.

2-120-850 Economic hardship exception—Commission determination.

Within 60 days following conclusion of the hearing under Section 2-120-840, the commission shall determine whether denial of the permit denies the applicant all reasonable and beneficial use of or return from the property. The determination shall be accompanied by a report stating the reasons for the decision. In the case of a finding of economic hardship, the decision shall also be accompanied by a recommended plan to relieve any economic hardship. This plan may include, but is not limited to, property tax relief, loans or grants from the city of Chicago or other public or private sources, acquisition by purchase or eminent domain, building code modifications, changes in applicable zoning regulations including a transfer of development rights, or relaxation of the provisions of this ordinance sufficient to allow reasonable beneficial use of or return from the property. (Prior code § 21-88; Added. Coun. J. 3-11-87, p. 40272)

2-120-860 Economic hardship exception—Appeal from commission decision.

The determination by the commission pursuant to Section 2-120-870 approving or disapproving an application for an economic hardship exception shall, on the date it issues, be a final administrative decision appealable to the

Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act, Illinois Revised Statutes, Section 3-101, et seq. (1985). (Prior code § 21-89; Added. Coun. J. 3-11-87, p. 40272)

2-120-870 Economic hardship exception—Report to city council.

Upon a determination by the commission pursuant to Section 2-120-850 finding an economic hardship, the commission shall forward its decision, report and proposal to the finance committee of the city council. (Prior code § 21-90; Added. Coun. J. 3-11-87, p. 40272)

2-120-880 Economic hardship exception—Finance committee consideration.

The finance committee of the city council shall give prompt consideration to the decision, report, and recommended plan to relieve economic hardship filed by the commission hereinabove provided, and shall recommend to the city council within 60 days after the receipt of said report whether or not said owner relief plan, as modified or not by the finance committee, shall be approved or disapproved. (Prior code § 21-91; Added. Coun. J. 3-11-87, p. 40272)

2-120-890 Economic hardship exception—City council decision.

The city council, within 30 days following said finance committee recommendation, shall approve or disapprove by ordinance a plan to relieve economic hardship to the owner. If the city council does not approve a plan to relieve economic hardship within the time specified, the plan to relieve economic hardship shall be deemed to be denied and the permit shall issue. If the city council approves a plan to relieve economic hardship that requires that any action be taken by city departments or agencies, the action shall be initiated within 30 days following passage of the ordinance. (Prior code § 21-92; Added. Coun. J. 3-11-87, p. 40272)

2-120-900 Hearings and hearing officers.

In any hearing conducted by the commission pursuant to Sections 2-120-680, 2-120-800 or 2-120-840 hereof, the commission may designate any commission member or members or any other person as hearing officer to hold such hearing and take evidence. No member of the commission absent from the entire hearing shall be eligible to vote on any matter which is the subject of the hearing until such member is provided with transcripts or tapes of the testimony heard and evidence presented at such hearing. The commission, in making its determination, shall take into account any written opinion of the appointed hearing officer, if any, on the evidence presented. (Prior code § 21-93; Added. Coun. J. 3-11-87, p. 40272)

2-120-910 Penalties and remedies for violations.

The following penalties and remedies shall be applicable to violations of this ordinance:

1. Penalties. Failure to perform any act required by the ordinance codified in this Article XVII or performance of any action which is prohibited by said sections shall constitute a violation thereof. Every day on which a violation exists shall constitute a separate violation and a separate offense. Any person violating any of the provisions of this ordinance shall be subject to a fine of not less than $500.00 nor more than $1,000.00 for each offense. In addition, if the owner of property designated a "Chicago Landmark" wilfully or through gross negligence causes all or any part of the property to be demolished or substantially destroyed or altered without the approval of the city council or the commission, as the case may be, then no permit to construct a new structure or improve said structure shall be issued for said property or for the land upon which the landmark stood within five years of

the date of the demolition or alteration. Thereafter for a period of 20 years, commencing at the end of the five-year period herein before stated, any application for a building permit on the subject premises shall follow the procedure heretofore set out in Section 2-120-740 through 2-120-800.

2. Remedies. Notwithstanding the provisions of subsection (1) hereof, in the event any building or structure is erected, constructed, reconstructed, altered, added to or demolished in violation of this ordinance, the city of Chicago may institute appropriate proceedings to prevent or remedy such unlawful erection, construction, reconstruction, alteration, addition or demolition. (Prior code § 21-94; Added. Coun. J. 3-11-87, p. 40272)

2-120-920 Severability.

If any provision of this ordinance or application thereof to any person or circumstance is invalid, such invalidation shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable. (Prior code § 21-95; Added. Coun. J. 3-11-87, p. 40272)

(5)

No. 96-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a lawsuit containing claims that a local administrative agency's decision violates federal law, but also containing state-law claims that are not reviewed de novo, is a civil action within the original jurisdiction of the federal district courts.

PARTIES TO THE PROCEEDING

Petitioners are the City of Chicago, the Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Friedman, Seymour Persky, Larry Parkman, Christopher R. Hill, and Cherryl Thomas.* Respondents are the International College of Surgeons, the United States Section of the International College of Surgeons, Robin Construction Corporation, 1500 Lake Shore Drive Building Corporation, and the North State, Astor, Lake Shore Drive Association.

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* One petitioner—Christopher R. Hill—was not named as a petitioner in the petition for certiorari, but has since succeeded petitioner Joseph F. Boyle, Jr., in office and accordingly is automatically substituted as a petitioner by virtue of this Court's Rule 35.3.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-910

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

The City of Chicago, its Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Friedman, Seymour Persky, Larry Parkman, Christopher R. Hill, and Cherryl Thomas (collectively "the City") submit this brief as petitioners.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 91 F.3d 981 (7th Cir. 1996). The opinions of the district court (Pet. App. 26a-96a; J.A. 129-41) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. A timely petition for rehearing was denied on November 4, 1996. Petitioners' petition for writ of certiorari was filed on December 4, 1996. This

Court granted the petition on April 14, 1997. The Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

STATUTES INVOLVED

Three statutory grants of jurisdiction to the federal courts are relevant here. The federal question statute, 28 U.S.C. § 1331, provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

The supplemental jurisdiction statute, 28 U.S.C. § 1367, provides in pertinent part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

[1] Under 28 U.S.C. § 1447(d), orders of a district court remanding a case to the state court from which it was removed for lack of federal jurisdiction are not subject to any form of appellate review. *E.g., Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494, 497-98 (1995). In this case, the district court did not remand the consolidated cases before it to state court but instead entered a final judgment on the merits. See Pet. App. 90a-91a. Accordingly, this case was properly "in" the court of appeals within the meaning of Section 1254(1) as an appeal from a final judgment under 28 U.S.C. § 1291. This Court, in turn, has consistently exercised jurisdiction under Section 1254(1) over cases in which the district court did not order a remand and the court of appeals held that it should have. See, *e.g., Mesa v. California*, 489 U.S. 121 (1989); *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972).

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

The removal statute, 28 U.S.C. § 1441, provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .
>
> (c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates. . . .

STATEMENT

The International College of Surgeons and the United States Section of the International College of Surgeons (collectively "ICS"), respondents in this Court, own two parcels of land on North Lake Shore Drive in the City of Chicago. Pet. App. 2a. One parcel is located at 1516

North Lake Shore Drive and is improved with a four-story mansion, called the Edward T. Blair House to reflect its historical significance. Pet. App. 2a. The other parcel is located at 1524 North Lake Shore Drive and is improved with a three-story mansion of historical significance, the Eleanor Robinson Countiss House. *Ibid.* In July 1988, the Commission on Chicago Historical and Architectural Landmarks (the "Landmarks Commission"), an agency of the City of Chicago created by the Chicago Landmarks Ordinance, made a preliminary determination that a district comprising seven buildings in that area, including the properties at issue, satisfied the criteria for designation as a landmark district under the Landmarks Ordinance. Pet. App. 3a.[2] In June 1989, the Chicago City Council followed this recommendation and enacted an ordinance creating the landmark district. *Ibid.*[3]

In February 1989, after the Landmarks Commission's preliminary determination, but before the City Council had acted, ICS signed a contract for the sale and redevelopment of the property. Pet. App. 3a. The contract called for the demolition of all but the facades of the two

[2] Under the ordinance, the Commission is empowered to make a preliminary determination that an area should be designated as a landmark. J.A. 163. After a public hearing, the Commission makes its final determination whether to recommend that the area should be designated. *Id.* at 165-67. The Chicago City Council then acts on the Commission's recommendation. *Id.* at 167-68. Once an area has received a preliminary landmark determination from the Landmarks Commission or a final determination from the City Council, no permit for any alteration, construction, demolition, relocation, or other work in the landmarked area may issue without the approval of the Commission. *Id.* at 169-70.

[3] The State of Illinois has granted authority to its municipalities to enact ordinances providing for the creation of landmark districts. See 65 ILCS para. 5/11-48.2-2. The City of Chicago also has authority to enact and enforce its Landmarks Ordinance under the home-rule power granted by the Illinois Constitution. See *Landmarks Preservation Council v. City of Chicago*, 125 Ill. 2d 164, 178-81, 531 N.E.2d 9, 15-16 (1988).

mansions and, behind the facades, the construction of a forty-one story, high-rise building. Pet. App. 3a. The sale was contingent on ICS's ability to obtain all necessary permits and approvals. *Ibid.* Respondent Robin Construction Corp. acquired the developer's interest in late 1989. *Ibid.* ICS applied for demolition permits in late 1990, and after a public hearing, the Landmarks Commission disapproved the demolition permits in January 1991. Pet. App. 3a; J.A. 20, 148.[4]

In February 1991, ICS filed suit in the Circuit Court of Cook County, Illinois, seeking judicial review of the Landmarks Commission's decision. Pet. App. 3a; J.A. 17-56.[5] The complaint alleged both state and federal claims, including claims that the Landmarks Commission's decision denied ICS its due process rights under the Fifth and Fourteenth Amendments, violated its right to equal protection under the Fourteenth Amendment, and constituted an uncompensated taking of property in violation of the Fifth and Fourteenth Amendments. J.A. 24-33. The complaint also alleged that the Landmarks Ordinance itself was facially unconstitutional under the Due Process and Equal Protection Clauses. *Id.* at 22-24. The City removed the case to the United States District Court for the Northern District of Illinois, where it was docketed as case number 91 C 1587. *Id.* at 11-16. In August 1991, the district court denied ICS's motion to remand the case to state court, concluding that ICS's complaint raised federal constitutional questions cognizable under 28 U.S.C. § 1331 and accordingly was within the scope of federal removal jurisdiction under 28 U.S.C. § 1441. Pet. App. 94a-96a.

Also in February 1991, ICS filed an application with the Landmarks Commission seeking demolition permits

[4] The procedures in the Landmarks Ordinance governing permit applications are found at J.A. 169-74.

[5] Under Illinois law, decisions of a municipal landmarks commission are "subject to judicial review pursuant to the provisions of the Administrative Review Law . . . ." 65 ILCS para. 5/11-48.2-4.

on grounds of economic hardship. Pet. App. 4a; J.A. 72.[6] Following public hearings, the Landmarks Commission denied this request. Pet. App. 4a; J.A. 73. ICS then filed a second action in state court seeking judicial review, again alleging the same federal constitutional violations as in its first complaint, along with certain state-law claims. J.A. 73-79. The City removed this action as well to the district court, where it was docketed as case number 91 C 5564. *Id.* at 57-64.[7]

After ICS's two district court actions were consolidated, the City moved to dismiss the complaints. J.A. 129. The district court granted the motions in part, dismissing some of ICS's federal-law claims with prejudice and some without prejudice, and denied the motions in part. *Id.* at 129-41.

In February 1992, ICS filed an amended consolidated complaint in federal court. J.A. 142. The complaint alleged that the court had jurisdiction over the consolidated actions because they fell within the district court's federal-question jurisdiction under 28 U.S.C. § 1331. *Id.*

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[6] This procedure was permissible under the Landmarks Ordinance which provides that if a permit application has been disapproved, the applicant may then seek an economic hardship exception. J.A. 174-77.

[7] ICS also submitted an application for approval of its redevelopment plan by the Chicago Plan Commission, as required under Chicago's Lakefront Protection Ordinance, but after a public hearing, the Plan Commission denied the application. Pet. App. 4a, 92a. ICS then sought an amendment to the Chicago Zoning Ordinance permitting the proposed development, but the Chicago City Council refused to approve the amendment. *Id.* at 4a. ICS filed a third suit, this time in federal district court (case number 91 C 7849), seeking review of these determinations under both federal and state law. *Ibid.* The district court stayed this third action pending its disposition of the two actions that had been removed from state court (*ibid.*) and later dismissed the case as moot (*id.* at 92a-93a). This third action is not at issue here.

at 143. The complaint included federal due process, equal protection, takings, and state-law claims. *Id.* at 149-56.

In December 1994, the district court granted summary judgment for the City. Pet. App. 89a. That court held that the Landmarks Ordinance was constitutional under both the United States and Illinois Constitutions and that the Landmarks Commission's decisions denying ICS's demolition permit and economic hardship applications were lawful under both Constitutions and under the Ordinance itself. *Ibid.* ICS appealed.

The court of appeals reversed and ordered the case remanded to the district court with instructions to remand it to state court. Pet. App. 2a. The court of appeals began by observing that removal jurisdiction exists over any "'civil action brought in a State court of which the district courts of the United States have original jurisdiction.'" *Id.* at 6a-7a (quoting 28 U.S.C. § 1441(a)). The inquiry under Section 1441(a) accordingly depends on whether "the action originally could have been brought in the district court." *Id.* at 7a. In this case, the district court had ruled that ICS's complaints were within federal-question jurisdiction under 28 U.S.C. § 1331 because they alleged that the Landmarks Ordinance was contrary to the United States Constitution and that the Landmarks Commission's decisions violated the United States Constitution. *Id.* at 20a. And the court of appeals agreed that the complaints "filed in the Circuit Court of Cook County and removed to the district court contain facial attacks [under the United States Constitution and] allegations of unfairness of a federal constitutional dimension . . . ." *Ibid.* The court thus acknowledged that the complaints contained "claims that, if brought alone, would be removable to federal court." *Ibid.*

The complaints also included state-law claims that were "grounded in the administrative record." Pet. App. 20a. The court of appeals recognized that under *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), and *Horton*

v. Liberty Mutual Insurance Co., 367 U.S. 348 (1961), "a state judicial proceeding to conduct de novo review of a state administrative decision is a 'civil action[] . . . of which the district court has original jurisdiction' within the meaning of 28 U.S.C. § 1441(a)." Pet. App. 11a (brackets and ellipsis in original). The court nevertheless rejected this result for cases in which "the state administrative review scheme provides for deferential review of a state agency's decision." *Ibid.* As the court of appeals saw it, in such cases, deferential review "would require the district court to perform an appellate role." *Id.* at 14a. This "function . . . could [not] be described as a 'civil action' within its original jurisdiction," because "an appellate function . . . is inconsistent with the character of a court of original jurisdiction." *Ibid.*

To determine whether this case was a "civil action" within the district court's "original jurisdiction," the court of appeals turned to Illinois law to analyze the type of review a state court would give to ICS's claims. Judicial review of nonconstitutional questions is a statutory procedure under the Illinois Administrative Review Law, which requires courts to confine their review to the record of proceedings before the administrative agency and to apply a "deferential standard of review" to challenged agency decisions. Pet. App. 18a-19a. In addition, Illinois law recognizes that an action seeking review of an agency's decision can include "facial attacks on the constitutionality of a statute or ordinance [that] are not dependent on the factual record developed at the administrative hearing." *Id.* at 18a. Finally, Illinois law recognizes that a plaintiff aggrieved by an administrative decision may attack a statute's constitutionality as applied to his own case and that "[s]uch a claim is independent of the administrative review proceeding and is therefore plenary in its scope; the court is not confined by the administrative record." *Id.* at 20a.

The court of appeals concluded that this case was a hybrid because it presented all of these claims. ICS's

complaints asserted "facial attacks on the validity of the statute, allegations of unfairness of a federal constitutional dimension, and claims based on state grounds that . . . must be adjudicated on the basis of the administrative record." Pet. App. 20a (footnote omitted). Thus, in the court of appeals' view, this case presented the question "whether, when the state action involves both claims that, if brought alone, would be removable to federal court with issues that clearly are grounded in the administrative record, removal of the entire state action to the district court is possible." *Ibid.* The court of appeals concluded that the removal statute " 'only authorizes the removal of *actions* that are within the original jurisdiction of the federal courts.' " *Id.* at 21a (emphasis in original) (quoting *Frances J. v. Wright*, 19 F.3d 337, 340 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994)). Accordingly, the court concluded that because ICS's statutory review claims required deferential review of the administrative record, this case "cannot be termed a 'civil action . . . of which the district courts . . . have original jurisdiction' within the meaning of [S]ection 1441(a)." *Id.* at 22a (ellipses in original).

SUMMARY OF ARGUMENT

The removal statute permits removal of a state-court action if it is a "civil action . . . of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The lawsuits that ICS filed in state court seeking review of decisions of the Landmarks Commission contained claims that ICS's federal constitutional rights had been violated—claims that fell within original federal-question jurisdiction under 28 U.S.C. § 1331—joined with claims for state administrative review. It has long been settled that a case containing claims that arise under federal law joined with state-law claims that arise from the same transaction or "common nucleus of operative facts" constitutes a "civil action" within the "original jurisdiction" of the district courts. *E.g., Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349-50 (1988). Congress has codi-

fied this doctrine in the supplemental jurisdiction statute, which expressly provides that in any "civil action of which the district courts have original jurisdiction," the court has further jurisdiction over state-law claims when the claims "are so related to claims in the action that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).

The court of appeals precluded removal here based on its conclusion that state-law claims seeking deferential review of decisions of an administrative agency are not "civil actions" within the district court's original jurisdiction. This conclusion shows two critical flaws.

First, state-law claims need not independently qualify as a "civil action" within the district court's "original jurisdiction" to be cognizable by federal courts. The plain language of the supplemental jurisdiction statute makes clear that state-law claims may be heard in federal court under the district court's "supplemental jurisdiction" as long as they are part of the same case or controversy. ICS's state-law claims easily satisfy that test because they—like the federal claims—arose from the same denials of ICS's applications for demolition permits.

Second, there is in fact no reason why the district court lacks jurisdiction over cases containing claims seeking judicial review of an agency's decision. Although a proceeding before an administrative agency itself is not a "civil action" and may not be removed, it has long been settled that once that proceeding ends and a party to it seeks judicial review, the resulting judicial proceedings are removable as a "civil action." In *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), for example, the railroad had sought review of an administrative decision in state court, and this Court wrote that once a party aggrieved by an administrative decision takes "a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal

by the defendant to the United States District Court." *Id.* at 578-79. Accord *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 354-55 (1961). While the court of appeals endeavored to distinguish *Stude* and *Horton* on the ground that those cases involved de novo review of an agency's decision and were for that reason alone "civil actions" within "original jurisdiction," this Court in *Califano v. Sanders*, 430 U.S. 99, 105-07 (1977), settled that actions seeking to review the decisions of federal administrative agencies under the Administrative Procedure Act ("APA") are "civil actions" within "original jurisdiction" under Section 1331; and it is quite clear that APA actions ordinarily do not permit de novo review. *E.g., Camp v. Pitts*, 411 U.S. 138, 141-42 (1973) (per curiam).

There is thus no basis in the text of the pertinent jurisdictional statutes or in this Court's precedents for the conclusion that the presence of state-law claims seeking on-the-record review of an agency's decision renders a case something other than a "civil action" within "original jurisdiction." Only creation of some sort of nonstatutory administrative review exception to federal jurisdiction could support the decision below. But since, under *Califano v. Sanders*, review of federal agency action is a "civil action" within the "original jurisdiction" of the district courts, the exception would exist only for federal judicial review of state or local agency decisions. Generally, such a different treatment of state and local agency decisions is based on this Court's concern for federalism.

Federalism, however, is hardly advanced by permitting federal courts, under *Stude* and *Horton*, to hear de novo attacks on state and local administrative decisions, but yet denying those courts the ability to give deference to those decisions. Nor is federalism served by denying state and local agencies the forum of their choice when, as here, they choose to defend their decisions in federal court. Finally, a special exception to federal jurisdiction for state administrative review claims is not necessary—for reasons of

federalism or otherwise—to prevent inappropriate federal intrusion on state law. To the contrary, the abstention cases make clear that the federal court has jurisdiction over even sensitive state-law issues, although there will be narrow circumstances in which the court should decline to exercise that jurisdiction.

ARGUMENT

One long-settled proposition of law supports the exercise of federal jurisdiction over the actions ICS filed: actions in which the plaintiff claims rights under federal law are within federal jurisdiction even when those claims are joined with claims seeking relief under state law. For decades it has been settled that federal-question jurisdiction is not defeated if the complaint also contains state-law claims arising from the same controversy between the parties. Here, ICS's state-court complaints alleged separate federal and state theories of liability, but they arose from a single event—the City's refusal to issue demolition permits for ICS's landmarked property. Under the well-established doctrine of pendent jurisdiction—now codified in the supplemental jurisdiction statute—a federal court has jurisdiction to hear related state-law claims along with the claims arising under federal law.

The court of appeals concluded that this rule does not reach state-law claims subject to on-the-record review of an administrative agency's decision. There is no support for this holding in the text of the pertinent jurisdictional statutes, in this Court's decisions, or in the jurisprudential policies that govern the ability of the federal courts to hear state-law claims. In fact, this Court has rejected both premises underlying the holding below. It has held that a state-law claim seeking review of an administrative decision may be removed, and that a district court may hear an attack on a federal agency's decision even though applicable law requires deferential and on-the-record review. Combining two elements neither of which in itself has ever been thought to defeat the exercise of federal jurisdiction—state-law challenges to an agency's decision and review on a deferential standard—is surely no basis to erect a new jurisdictional limitation on the federal courts.

I. ICS'S COMPLAINTS ALLEGE FEDERAL QUESTIONS AND WERE THEREFORE REMOVABLE.

As the court of appeals acknowledged, ICS's state-court complaints contained claims arising under federal law joined with state administrative review claims. Under the plain language of the pertinent jurisdictional statutes, this type of joinder does not defeat removal jurisdiction.

A. A State-Court Complaint Alleging Federal And State Claims Is Removable.

The removal statute provides for removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Accordingly, "state court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Here, "as for many cases . . . the propriety of removal turns on whether the case falls [into] original 'federal question' jurisdiction . . . ." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 (1983). That question, in turn, depends on whether ICS's complaints were "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

That issue, however, is not controlled by whether ICS alleged state-law claims in addition to its federal claims. That much was settled by *Siler v. Louisville & N.R. Co.*, 213 U.S. 175 (1909). In that case, the railroad filed suit in federal court to enjoin a rate order issued by a state railroad commission, and alleged both federal constitutional and state-law claims. *Id.* at 176-77. The Court held that federal-question jurisdiction authorized the federal court to exercise jurisdiction over both the federal and state-law

grounds. "The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the [federal] circuit court jurisdiction, and having properly obtained it, that court had the right to decide all questions in the case . . . ." *Id.* at 191.

In *Hurn v. Oursler*, 289 U.S. 238 (1933), the Court refined this doctrine by holding that pendent jurisdiction under *Siler* over state-law claims extended to all claims that arise from the same cause of action that gave rise to the federal claims. See *id.* at 243-46. In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Court broadened this pendent jurisdiction to reach all state-law claims joined with federal claims that arise from "but one constitutional 'case.'" *Id.* at 725 (footnote omitted). And that test is satisfied when "[t]he state and federal claims . . . derive from a common nucleus of operative fact." *Ibid.*

Thus, this Court has construed Section 1331 to require only that the complaint contain some claim that invokes federal-question jurisdiction. That, then, is a "civil action" within "original jurisdiction" as that term is used in the federal-question statute. The addition of state-law claims that arise from the same nucleus of fact does not defeat jurisdiction over that civil action. *E.g., Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349 (1988); *Aldinger v. Howard*, 427 U.S. 1, 9 (1976).

The supplemental jurisdiction statute explicitly recognizes this. It codifies the doctrine of pendent jurisdiction by providing that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jursdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Again, all that matters is the existence of a "civil action" within "original jurisdiction"; state-law claims that arise from the same constitutional "case" are within supplemental jurisdiction and are, for that reason, also within the jurisdiction of the district court.[8] Under this plain language, joinder of state-law claims arising from the same transaction as the federal claims does not destroy federal jurisdiction but rather is a basis for the exercise of supplemental jurisdiction.

For this same reason, joinder of federal and state-law claims does not defeat removal jurisdiction. The removal statute uses the same phrase as the federal-question and supplemental jurisdictional statutes. It creates removal jurisdiction for "any civil action . . . of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). These identical phrases, which arise in an interrelated statutory scheme, should surely be interpreted to have the same meaning. See, *e.g., Commissioner v. Lundy*, 116 S. Ct. 647, 655 (1996); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1067 (1995); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). And if a consistent interpretation is given to "civil action" within "original jurisdiction," a complaint is removable even if state-law claims are joined with federal claims, for the same reason that such a complaint can be filed in the district court in the first instance: the district court's original and supplemental jurisdiction reaches all claims arising from a single transaction.

And because removal is proper whenever the district court would have had original jurisdiction had the case originally been brought there, a complaint filed in a state court containing both federal and state claims is removable. See, *e.g., Carnegie-Mellon*, 484 U.S. at 350-51

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[8] The courts of appeals have held that Section 1367 extends the federal court's authority to hear such claims to the full constitutional extent conferred by Article III. See, *e.g., Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995); *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1018 (5th Cir.), cert. denied, 508 U.S. 956 (1993).

(pendent state-law claims properly removed under Section 1441).

The legislative history of the supplemental jurisdiction statute confirms that Congress intended to authorize the exercise of federal jurisdiction over cases in which federal and state claims are joined. The House Report explains: "In federal question cases, [the statute] broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims . . . ." H.R. Rep. No. 101-734, at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6874. It is also clear from the legislative history that these additional claims are ones over which the federal courts would not otherwise have jurisdiction. See *id.* at 27, 1990 U.S.C.C.A.N. at 6873. And both before and after the enactment of the supplemental jurisdiction statute the lower federal courts have universally held that there is federal jurisdiction over suits containing federal and state claims, including state-law challenges to the land-use decisions of local administrative agencies. See, *e.g.*, *Bickerstaff Clay Products Co. v. Harris County*, 89 F.3d 1481, 1484-85 n.4 (11th Cir. 1996) (district court had power to hear zoning claims under supplemental jurisdiction when joined with Section 1983 claims alleging takings violations); *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 96-97 (1st Cir. 1977) (pendent jurisdiction properly exercised over state-law nuisance and environmental claims joined with Section 1983 claim).

The supplemental jurisdiction statute—using identical language to the removal statute and unquestionably recognizing federal jurisdiction in cases in which state-law claims are joined with a federal claim—thus provides proof positive that a "civil action" within "original jurisdiction" is removable when federal and state claims are joined. We turn therefore to the question whether ICS's complaints fall within original—and hence removal—jurisdiction because they alleged claims falling within federal-question jurisdiction, properly joined with state-law claims.

B. The Complaints At Issue Here Allege Claims That Arise Under The Federal Constitution.

The City removed ICS's state-court complaints from state to federal court because those complaints contained claims within federal-question jurisdiction—namely that the Landmarks Commission's refusal to issue demolition permits, as well as the Landmarks Ordinance itself, violated ICS's rights under the United States Constitution. J.A. 22-33, 73-76.[9] The complaints, although not broken out into separate counts, contain numerous allegations of federal constitutional violations. The first complaint specifically alleged that the particular ordinance authorizing the Landmarks Commission's preliminary designation of ICS's property as a landmark deprived ICS of its right under the United States Constitution to due process of law. *Id.* at 22-23. The complaint further alleged that the Landmarks Ordinance's exemption for property used for religious purposes violated federal due process and equal protection guarantees. *Id.* at 23-24. And the complaint alleged that the ordinance landmarking this particular property was a taking of property without the payment of just compensation in violation of the Takings Clause of the Fifth Amendment and also constituted arbitrary legislative action in violation of due process and equal protection principles. *Id.* at 24-26. The complaint further alleged that the Landmarks Commission took a variety of steps to deprive ICS of a fair hearing in violation of the Due Process Clause. *Id.* at 26-32, 33. In ICS's second state-court complaint, which challenged the denial of its application for an economic hardship exception, there are six assignments of error that rest solely on the United States Constitution, and two more that rest on both the Federal and the Illinois Constitutions. *Id.* at 73-76. In both complaints

[9] The removal petitions cited 28 U.S.C. § 1441(b), which provides for removal "founded on a claim or right arising under the Constitution, treaties or laws of the United States . . . without regard to the citizenship or residence of the parties."

ICS asked for a declaration that both the Landmarks Ordinance itself and the particular ordinance landmarking ICS's property were unconstitutionl and that the Landmarks Commission's decisions on its applications were illegal as well. *Id.* at 35, 78.[10]

A case "arise[s] under" federal law, within the meaning of Section 1331, when "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank*, 299 U.S. 109, 112 (1936). Accord, *e.g.*, *Christianson v. Colt Industries Operating Co.*, 486 U.S. 800, 808 (1988); *Franchise Tax Board*, 463 U.S. at 10-11; *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974) (per curiam).[11] Here, ICS forwarded claims that had, as an essential element, a right or immunity created by the Constitution.

ICS styled its complaints as complaints for administrative relief pursuant to the Illinois Administrative Review Act, 735 ILCS paras. 5/3-101 to 5/3-112. Such actions are proceedings in which the record before the agency is reviewed to ensure its compliance with all applicable law. See *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 427, 551 N.E.2d 640, 645 (1990). As the court of appeals acknowledged (Pet. App. 17a-20a), administrative review complaints properly include claims

[10] Indeed, when ICS filed an amended complaint in the district court, it acknowledged that its lawsuit raised federal claims that arose under federal law within the meaning of Section 1331. See J.A. 143.

[11] In addition to federal-question jurisdiction under Section 1331, the district courts have original jurisdiction over any action "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States . . . ." 28 U.S.C. § 1343(3). We do not separately discuss Section 1343(3), since the jurisdictional inquiry under that Section does not differ meaningfully from the inquiry under Section 1331.

that the administrative decision violates a federal constitutional right of the aggrieved party. See *Howard v. Lawton*, 22 Ill. 2d 331, 333, 175 N.E.2d 556, 557 (1961); *Winston v. Zoning Board of Appeals*, 407 Ill. 588, 591-92, 95 N.E.2d 864, 867-68 (1950). On constitutional claims, the reviewing court may admit evidence beyond the administrative record. See *Stratton*, 133 Ill. 2d at 428-30, 551 N.E.2d at 646. And when such claims are "an integral part of review" of a local agency's decision applying a local ordinance, they do "not have to be pleaded in a separate count." *Howard*, 22 Ill. 2d at 333; 175 N.E.2d at 557.[12]

The federal constitutional claims alleged in the administrative review complaints arose under federal law. ICS straightforwardly claimed that the United States Constitution granted it a right to have the Landmarks Commission's decisions set aside. These claims were in no way dependent on state law. Rather, to obtain relief, ICS would have to establish a violation of its federal constitutional rights—no more and no less. Thus it asserted a federal "right or immunity." This is the same principle that governs the "complete preemption" cases, which "arise under" federal law within the meaning of Section 1331 even when a complaint purports to plead only a state-law claim. If the state-law theory advanced in such a complaint falls within an area that is completely preempted by federal law, the action is within federal-question jurisdiction, and therefore is removable, because there simply is no state law to apply. See, *e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. at 393; *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63-67 (1987); *Franchise Tax Board*, 463 U.S. at 24. Here, ICS's federal constitutional claims that it was entitled to demolition permits regardless of any state or local statute, ordinance, or rule of law arose under federal law

[12] In fact, under Illinois practice it is always proper to plead an equitable action in a single count. See Ill. Sup. Ct. R. 135(a).

for this same reason. On those claims, there is simply no state law to apply.

For this reason, ICS's election to use its state statutory administrative review remedy—and to plead in a single count—does not mean that it failed to raise claims under federal law. ICS chose to plead numerous federal constitutional claims and thereby to invoke its federal rights. ICS's desire to litigate claims arising under federal law in state court cannot defeat the statutory right of removal. As the Court explained in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the federal "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum.'" *Id.* at 397 n.2 (quoting 14 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3722 at 564-66 (1976)). See also *Metropolitan Life Insurance*, 481 U.S. at 63-67 (a plaintiff's decision to plead a state claim will not defeat removal when federal law governs the plaintiff's rights). Instead, the courts will "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Federated Department Stores*, 452 U.S. at 397 n.2 (citation omitted). See also, *e.g.*, *Bell v. Hood*, 327 U.S. 678, 681-82 (1946) (complaint need not spell out federal constitutional claims specifically to sustain federal-question jurisdiction); *Hopkins v. Walker*, 244 U.S. 486, 489-91 (1917) (where "form and substance" of plaintiffs' complaint states a claim under the laws of the United States, federal jurisdiction exists).

To be sure, the administrative review procedure invoked by ICS was created by state statute, and it is frequently the case, as Justice Holmes wrote, that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). The Court acknowledged in *Franchise Tax Board*, however, that "it is well settled that Justice Holmes'

test is more useful for describing the vast majority of cases that come within the district court's original jurisdiction than it is for describing which cases are beyond district court jurisdiction." 463 U.S. at 9. The Court added that "even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle." *Ibid.* (citing *Flournoy v. Wiener*, 321 U.S. 253, 270-72 (1944) (Frankfurter, J., dissenting)). Here, although a state statute authorized the proceeding by which ICS sought review of the refusal to issue it demolition permits, its complaints plainly alleged that it was entitled to those permits as a matter of federal constitutional right. Such a claim arises under federal law precisely because it is based on a "right or immunity created by the Constitution or laws of the United States . . . ." *Franchise Tax Board*, 463 U.S. at 10-11 (quoting *Gully*, 299 U.S. at 112).[18]

Of course, even if ICS's federal constitutional claims were deemed to arise under the state administrative review statute rather than federal law, that would not defeat federal-question jurisdiction here because they could not be adjudicated without a determination whether federal law granted ICS the rights it asserted. In *Franchise Tax Board*, the Court wrote that it has "often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction

[18] When a plaintiff alleges a violation of federal law, but federal law grants it no right of action to seek relief, the claim does not arise under federal law. That was the holding in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 (1986). Here, ICS alleged that the refusal to approve its applications for demolition permits denied it due process and constituted a taking of its property without payment of just compensation; and the existence of a right of action for a violation of these federal rights by the decision of a state or local agency is clear. See, *e.g.*, *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 366 (1989) (Equal Protection Clause); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (Takings Clause); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Due Process Clause).

of federal law." 463 U.S. at 9. Thus, federal-question jurisdiction extends to " 'those cases in which a well-pleaded complaint establishes *either* that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.' " *Christianson*, 486 U.S. at 808 (quoting *Franchise Tax Board*, 463 U.S. at 27-28 (emphasis added)).

For example, in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), a shareholder brought suit to enjoin officers of the trust company from investing in federal loan bonds because, the shareholder alleged, such an investment was beyond the bank's powers, and the acts of Congress authorizing the bond sale were unconstitutional. See *id.* at 195-96, 198. As the Court explained, "[t]he general rule is that, where it appears . . . that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such Federal claim is not merely colorable, and rests upon a reasonable foundation, the district court has jurisdiction . . . ." *Id.* at 199. On this basis, the Court determined that the federal court had jurisdiction over Smith's suit, purportedly brought under state law, because "[t]he decision depends upon the determination of this [federal constitutional] issue." *Id.* at 201. Accord *Hopkins*, 244 U.S. at 489 (case "aris[es] under" laws of the United States "where an appropriate statement of the plaintiff's cause of action . . . discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of Congress"). Thus, although the case may not arise under federal law when federal law is merely one element of a state-law theory of liability, it does arise under federal law when the plaintiff's claims depend solely on the existence of a constitutional right. Cf. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986) (jurisdictional inquiry turns on whether federal or state-law issues predominate).

Under this test, even if ICS's complaints are read as predicated solely on a state-created right to obtain judicial review of an administrative decision, they still assert a right arising under federal law. ICS explicitly alleged that the Landmarks Commission's actions were unlawful because they violated its federal constitutional rights. The disposition of these claims is solely dependent on the resolution of substantive issues of federal law; state law cannot be used to adjudicate these claims.[14]

Accordingly, ICS's federal constitutional allegations, although advanced in the framework of administrative review complaints, turned solely on issues of federal law. These complaints arose under federal law within the meaning of Section 1331.

C. ICS's Complaints Invoked Federal Jurisdiction.

ICS's complaints properly invoked federal jurisdiction over this action. A complaint that makes claim to rights arising under federal law, even if those claims prove meritless, supports federal jurisdiction as long as those claims are not "frivolous or so insubstantial as to be beyond the jurisdiction of the District Court." *Hagans v. Lavine*, 415 U.S. 528, 539 (1974); accord, *e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993); *Duke*

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[14] The provision in the Administrative Review Law for filing administrative review actions in state court (see 735 ILCS para. 5/3-104) does not affect removability. It is well settled that a State cannot enlarge or restrict the jurisdiction of the federal courts. See *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 253 (1905). As the Court explained in *Barrow v. Hunton*, 99 U.S. 80 (1879), "[i]f the State Legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to those courts." *Id.* at 85. Thus, in *Commissioners of Road Improvement District No. 2 v. St. L. Sw. Ry. Co.*, 257 U.S. 547 (1922), for example, the Court allowed removal even though state procedures required the case to be filed in a state court. *Id.* at 561-62.

Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 70-71 (1978); *Bell v. Hood*, 327 U.S. at 683-84. ICS's claims challenging the constitutionality of the Landmarks Commission's decisions and seeking a declaration to that effect were sufficiently substantial to avoid that difficulty. While we agree with the district court that those claims are in fact without merit, the district court's opinions make clear that these claims were not wholly illusory or frivolous. See Pet. App. 33a-46a; J.A. 134-39. Indeed the court of appeals agreed that this case includes "claims that, if brought alone would be removable to federal court." Pet. App. 20a.

That should have been enough to sustain removal jurisdiction. As we explain above, as long as a complaint contains some claims that invoke federal-question jurisdiction, it constitutes a "civil action" within the district court's "original jurisdiction" even if those claims are joined with state-law claims. Related state-law claims can be heard under the district court's supplemental jurisdiction. Under that statute, when there is a "civil action" within the district court's "original jurisdiction," that court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Here, ICS's state-law claims arise from the same nucleus of operative fact as its federal claims—its inability to obtain demolition permits for its landmarked property. And in such cases, under the supplemental jurisdiction statute, the district court "shall have supplemental jurisdiction." [15]

Even if ICS's state-law claims were deemed to be separate from its federal claims and hence not within the district court's supplemental jurisdiction, that would not de-

[15] At most, the statute permits a district court to decline to exercise supplemental jurisdiction when there are novel or complex issues of state law, when state-law claims predominate over federal claims, or in other exceptional circumstances. See 28 U.S.C. § 1367(c). None of these exceptions applies here.

feat removal. That is because the removal statute also provides: "Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed . . . ." 28 U.S.C. § 1441(c).[16] Thus, it hardly matters whether ICS's state-law claims are considered sufficiently related to its federal claims to fall within supplemental jurisdiction; in either case removal was proper here.

Of course, the court of appeals did not hold that ICS's complaints were non-removable because they contained no claims arising under federal law, nor did it hold that the complaints were non-removable merely because they contained state-law claims. Rather the court below held that when state-law claims that seek deferential review of an administrative decision based on the record before the agency are present in a complaint, such claims defeat removal. It is to that question that we next turn.

II. THE PRESENCE OF A STATE ADMINISTRATIVE REVIEW CLAIM IN A STATE-COURT COMPLAINT DOES NOT DEFEAT REMOVABILITY.

The court of appeals' holding that the inclusion in ICS's complaints of state-law administrative review claims over which a court would not exercise de novo review made the lawsuit something other than a "civil action" within "original jurisdiction" and hence non-removable is erroneous for three reasons. First, under the plain language of the supplemental jurisdiction statute, such state-law claims need not independently qualify as a "civil action" within the federal court's "original jurisdiction" as long as they constitute "claims" that are sufficiently "related to" a "civil action" within "original jurisdiction." Second, there is

[16] Under this statute, at most, a district court "may remand all matters in which State law predominates." 28 U.S.C. § 1441(c).

nothing about actions seeking on-the-record judicial review of an administrative decision that renders them beyond the jurisdictional competence of the district courts. Third, even if a state-court complaint contains some claims not within any form of federal jurisdiction, that does not defeat removal of the claims that are within federal jurisdiction.

A. ICS's State Administrative Review Claims Fall Within Supplemental Jurisdiction.

The court of appeals concluded "if even one claim in an action is jurisdictionally barred from federal court . . . or does not fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court." Pet. App. 21a (quoting *Frances J. v. Wright*, 19 F.3d 337, 341 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994)). The court of appeals failed to recognize, however, that all of ICS's claims fall within federal jurisdiction—the federal claims within original jurisdiction and the state claims within supplemental jurisdiction.

The plain language of the supplemental jurisdiction statute, as we explain above, makes clear that when a complaint contains claims falling within federal-question jurisdiction, the district court also has supplemental jurisdiction over "all other claims" that form part of the same case or controversy. As we also explain above, ICS's state-court complaints contained claims falling within federal-question jurisdiction, and its state-law claims derived from the same nucleus of operative fact. For just these reasons, the district court determined that the requirements of supplemental jurisdiction were satisfied, and the court exercised that jurisdiction here. See Pet. App. 45a-46a.

The court of appeals explained at some length why it believed that ICS's state-law administrative review claims did not constitute a "civil action" within "original jurisdiction" (see Pet. App. 7a-19a), but apparently failed to consider whether these were "claims" within the meaning of the supplemental jurisdiction statute. Whether or not these claims independently qualify as a "civil action" within "original jurisdiction," surely these state-law bases for challenging the Landmarks Commission's decisions are "claims," as the court of appeals appears to have acknowledged. See *id.* at 4a, 20a, 23a (referring to ICS's administrative review claims as "claims"). And the whole point of the supplemental jurisdiction statute is, of course, that the federal court need not have original jurisdiction over the claims falling within its supplemental jurisdiction. Rather, as we explain above, the doctrines of pendent, and now supplemental, jurisdiction were created precisely to provide jurisdiction for claims that did not independently meet federal jurisdictional requirements, but that were joined with a claim that did.

To the extent that the court of appeals addressed this portion of our submission, the court appears to have rejected reliance on Section 1367(a) not because ICS's state-law claims were not "claims" sufficiently "related to" its federal claims within the meaning of the supplemental jurisdiction statute, but instead because it considered claims seeking deferential review based on an agency record to be a form of "appellate review [that] can hardly be characterized as a 'claim' in an 'original action.'" Pet. App. 22a. But a requirement that supplemental claims be an "original action" involving de novo review appears nowhere in the text of Section 1367—the statute refers only to "claims" that are "related to" the "civil action" within "original jurisdiction." And the statute plainly contains no exemption to supplemental jurisdiction for state administrative review claims, nor for claims involving local land-use issues, as we explain above. At most the statute authorizes a district court to decline to exercise supplemental jurisdiction over state-law issues in certain narrow circumstances (see 28 U.S.C. § 1367(c)) and plainly does

not contain the blanket administrative-review exception to federal jurisdiction announced by the court below.

Accordingly, whether or not ICS's state-law claims could be considered a "civil action" within "original jurisdiction," they were within the district court's supplemental jursdiction because they were joined with nonfrivolous, related federal-law claims. And when all the claims in a complaint are within either original or supplemental jurisdiction, the entire case is removable. See, *e.g.*, *Zuniga v. Blue Cross and Blue Shield of Michigan*, 52 F.3d 1395, 1399 (6th Cir. 1995) (action removable where due process claim provided federal question jurisdiction and state-law contract and statutory claims fell within supplemental jurisdiction); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 785-87 (3d Cir. 1995) (action that included Section 1983 claims and supplemental state-law tort claims properly removed under Section 1441(a)). See also *Carnegie-Mellon*, 484 U.S. at 350-51 (removal of pendent claims prior to enactment of supplemental jurisdictional statute proper).

B. Administrative Review Claims Can Be Heard By The District Courts.

In any event, the court of appeals was incorrect that an action seeking deferential review on the record of proceedings before a state or local administrative agency is not removable because "removal to federal court would require the district court to perform an appellate role . . . that could [not] be described as a 'civil action' within its original jurisdiction." Pet. App. 14a. This conclusion is squarely inconsistent with the scope of the district court's jurisdiction to review federal agency decisions.

The Administrative Procedure Act ("APA") grants a right of judicial review to persons aggrieved by a decision of a federal administrative agency. See 5 U.S.C. §§ 701-706. Yet the APA ordinarily does not permit trial de

novo in the district court. See *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973) (per curiam). The statute also requires courts to grant a substantial measure of deference to an agency's decision; an agency's decision will be set aside only where "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" upon review of the "whole record." 5 U.S.C. § 706.[17] And this is a narrow form of review. As the Court explained in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), "the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Id.* at 43. The APA thus requires courts to grant substantial deference to the decision of the agency. See, *e.g.*, *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). Indeed this point was settled as early as *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951), in which the Court upheld an agency's decision as supported by the record because the Court found that the testimony before the agency was "consistent and credible" and its finding was a rational one. See *id.* at 508.

Despite the deferential review of federal agency actions, this Court, in *Califano v. Sanders*, 430 U.S. 99 (1977), held that the district courts have original federal-question jurisdiction under Section 1331 over actions seeking review of decisions under the APA. See *id.* at 105-07. See also *McCartin v. Norton*, 674 F.2d 1317, 1320 (9th Cir. 1982) ("[w]hile the Administrative Procedure Act does not confer jurisdiction on the federal courts to review agency action, it is now clear that 28 U.S.C. § 1331[] does"). Thus the very form of review that the court of appeals here deemed inconsistent with a district court's removal jurisdiction—deferential review based on the

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[17] In certain circumstances, the agency decision also can be set aside where it is not supported by substantial evidence. See 5 U.S.C. § 706(2)(E); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971).

agency record rather than de novo review in the district court—was held to qualify as a "civil action" within "original jurisdiction" in *Califano v. Sanders*. And, as we explain in Part I.A above, if an action falls within federal-question jurisdiction under Section 1331, it is also removable under Section 1441.

The holding below can be reconciled with federal-question jurisdiction over APA actions only if district courts are considered jurisdictionally competent to provide deferential review of federal but not state or local administrative decisions. Yet, there is nothing in the text of the pertinent jurisdictional statutes to suggest that a district court can perform what the court of appeals branded an "appellate role" when it reviews the decision of a federal agency under federal law, but not when it reviews the decision of a state agency under state law. The plain meaning of the phrase "civil action" would seem to include all administrative review claims—administrative review claims are "civil" in character and involve an "action" seeking judicial redress for an alleged violation of law. And in fact, this Court has not recognized any special jurisdictional rules governing state-law challenges to an administrative decision. To the contrary, the Court has acknowledged at least twice that actions seeking to review the decision of an administrative agency on state-law grounds qualify as "civil actions" within "original jurisdiction" under the diversity jurisdiction statute, which uses the same terminology found in the federal-question and removal statutes.[18]

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[18] The diversity jurisdiction statute provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States . . . .

28 U.S.C. § 1332.

In the first of those cases, *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), the railroad filed suit in state court challenging the amount of the condemnation damages that a county commission had assessed against it for the acquisition of certain land, and then removed the action to federal court because the parties were of diverse citizenship. See *id.* at 576. The Court acknowledged that a proceeding before an administrative agency is not a "civil action," but that once judicial review is sought in state court, the proceeding becomes a removable civil action:

> [t]he proceeding before the [commission appointed by the] sheriff is administrative until the appeal has been taken to the district court of the county. Then the proceeding becomes a civil action pending before "those exercising judicial functions" for the purpose of reviewing the question of damages. When the proceeding has reached the stage of a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court.

Id. at 578-79 (citation omitted). In the end, the Court determined that removal was improper but only because the case had been removed by the railroad, which, as the plaintiff in state court, was not entitled to remove the case. See *id.* at 579-80. See also *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 195 (1959) ("[a]lthough holding [in *Stude*] that the [railroad] could not remove a state condemnation case to the Federal District Court on diversity grounds because [it] was the plaintiff in the state proceeding, the Court clearly recognized that the defendant in such a proceeding could remove in accordance with § 1441 and obtain a federal adjudication of the issues involved").

The railroad had also filed a second action, this one in federal district court. See 346 U.S. at 576. In the portion of the *Stude* opinion upon which the court of appeals relied

here, this Court ordered that action dismissed because it challenged only one portion of the proceedings—the amount of the condemnation damages award—while the judgment underlying that award relating to the landowner's substantive right to damages and the railroad's eminent domain powers was contested elsewhere. See *id.* at 582. Thus, the railroad was attempting to "separate the question of damages and try it apart from the substantive right from which the claim for damages arose." *Ibid.* It was in that context that the Court wrote that a district court "does not sit to review on appeal action taken administratively or judicially in a state proceeding." *Id.* at 581. That, then, is the type of "appellate" proceeding to which the Court objected—one in which the plaintiff seeks to review only a particular finding of an agency even though the rest of the "case," in the constitutional sense, is pending elsewhere.[19] Indeed, the Court suggested that if the suit had been properly brought as an action seeking condemnation of property, then the Court would have had jurisdiction over the matter. See *id.* at 582.

In the second case, *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961), the dicta in *Stude*, acknowledging that an action contesting the decision of an administrative agency was removable, was turned into a holding. *Horton* was a diversity action filed in federal court by Liberty, an insurance company, challenging under state law a workers' compensation award made to Horton by the Texas Industrial Accident Board. See *id.* at 349-50. The Court concluded that the action was a civil action, capable of being heard in the first instance in district court "as any other suit" because when it was filed, the case was withdrawn from the Board. See *id.* at 354. Thus, under *Horton* an action to review the decision of a state administrative agency constitutes a "civil action" within the court's "original jurisdiction" under the diversity jurisdiction statute. *See id.* at 355.

[19] That conclusion is consistent with the Court's holding in *Barrow v. Hunton* that a proceeding related to another suit in such a way that it is merely a "supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it" will not be considered a "suit" for purposes of original federal jurisdiction or removal. 99 U.S. at 82-88. In *Barrow*, the Court concluded that a proceeding to obtain the nullity of a judgment, which had to be brought in the same court that rendered the judgment, was too much a supplemental proceeding and therefore was not a suit. *See id.* at 85. See also *First National Bank v. Turnbull*, 83 U.S. (16 Wall.) 190 (1873) (action to recover property in judgment-debtor's possession considered an "auxiliary to the original action"). This consideration is not at issue here.

Horton and the dicta in *Stude* are joined by numerous other cases in which this Court has recognized that there is federal jurisdiction over actions to review the decision of a state agency on state-law grounds. See, *e.g.*, *Commissioners of Road Improvement District No. 2 v. St. L. Sw. Ry. Co.*, 257 U.S. 547, 560-62 (1922) (appeal of assessors' proceeding to state county court to set damages arising from road improvement was properly removed to federal court on diversity grounds); *Siler*, 213 US. at 193-98 (action to enjoin rate order properly heard under pendent jurisdiction); *Union Pacific Ry. Co. v. Meyers*, 115 U.S. 1, 18-23 (1885) (appeal of valuation of property tried before mayor was properly removed to federal court under federal-question jurisdiction); *Mississippi and Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406-07 (1879) (diversity action to value condemned property properly removed to federal court). There is thus plainly no rule forbidding federal courts from reviewing administrative decisions of state or local officials.

The historical understanding of the authority of the federal courts to review administrative decisions also makes clear that administrative review cases are "civil actions" within "original jurisdiction" regardless of the scope of review exercised. The Judiciary Act of 1789 gave federal courts jurisdiction, as a matter of "original cognizance" and as a matter of removal, over a "suit of

a civil nature at common law or in equity" where those suits met requirements such as diversity between the parties. See Act of Sept. 24, 1789, §§ 11, 12, 1 Stat. 73, 78-80. It is thus appropriate to begin the historical inquiry with the most basic denominator: the term "suit." Early on, this Court found that the term "suit" has a "comprehensive" definition such that it "appl[ies] to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him . . . . [I]f a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit." *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 464 (1829).

Since administrative agencies were not easily classified as "courts," the inquiry for purposes of removal jurisdiction turned on the nature of the proceeding and the function of the administrative body. When the proceeding and the function of the administrative body were wholly administrative in nature, the proceeding was not considered a suit. See, *e.g.*, *County of Upshur v. Rich*, 135 U.S. 467 (1890) (county court not permitted duties of a judicial nature and thus assessment not a suit removable to federal court). But where the proceeding was brought before a body that exercised judicial functions, by appeal or otherwise, it became a suit over which the courts had cognizance. In *Upshur*, the Court explained the distinction:

> [A] proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character and cannot, in any just sense, be called a suit; [and] an appeal, in such a case, to a board of assessors or commissioners having no judicial powers and only authorized to determine questions of quantity, proportion, and value, is not a suit, [but] such an appeal may become a suit if made to a court or tribunal having power to determine questions

> of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other.

135 U.S. at 477.[20] *Mississippi and Rum River Boom Co.* reflects the same distinction. That case grew out of a "proceeding [before] commissioners appointed to appraise [certain] land," which the Court acknowledged "was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms." 98 U.S. at 406. The Court then observed: "But when it was transferred to the [state] District Court by appeal from the award of the Commissioners, it took, under the statute of the State, the form of a suit at law and was thenceforth subject to its ordinary rules and incidents. . . ." *Id.* at 406-07. At that point, the suit could be removed to federal court. See *ibid.*

As for the "civil" component of the phrase "suit of a civil nature," in both the Judiciary Act of 1789 (Act of Sept. 24, 1789, §§ 11-12, 1 Stat. 73, 78-80) and the later federal-question statute (Act of March 3, 1875, § 1, 18 Stat. 470), that term designates simply a suit "in contradistinction to one involving 'crimes and offenses.'" *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 270 (1935). As the Court explained in *Milwaukee County*,

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[20] The Court added:

> At the same time we do not lose sight of the fact, presented by every day's experience, that the legality and constitutionality of taxes and assessments may be subjected to judicial examination in various ways, —by an action against the collecting officer, by a bill for injunction, by certiorari and by other modes of proceeding. Then, indeed, a suit arises which may come within the cognizance of the federal courts, either by removal thereto, or by writ of error from this court, according to the nature and circumstances of the case. Even an appeal from an assessment, if referred to a court and jury, or merely a court, to be proceeded in according to judicial methods, may become a suit within the Act of Congress.

135 U.S. at 473.

"suits of a civil nature . . . are those which do not involve criminal prosecution or punishment, and which are of a character traditionally cognizable by courts of common law or equity." *Id.* at 271. It was on this same understanding that the Court in *Ames v. Kansas*, 111 U.S. 449 (1884), concluded that a quo warranto action could be removed, for it was civil rather than criminal in nature. *Id.* at 460-61. See also *id.* at 460 (stating that, under Kansas law, "[a]ctions are of two kinds, *first*, civil, *second*, criminal. A criminal action is one prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof. Every other action is a civil action." (citations omitted) (emphasis in original)).

The phrase "suit of a civil nature in law and equity" remained in the statutory provisions conferring federal-question jurisdiction and removal jurisdiction until the recodification of the Judicial Code in 1948. Sections 1331 and 1441 were then amended with the substitution of the now-familiar term "civil action." 1948 Judicial Code and Judiciary Act, 62 Stat. 930; 62 Stat. 937-38; see *Finley v. United States*, 490 U.S. 545, 554 (1989). The change made them consistent with Rule 2 of the Federal Rules of Civil Procedure, which provides that "[t]here shall be one form of action to be known as civil action." See H.R. Rep. No. 308, at App. 1701, 1833, 1854 (1947) (Reviser's notes) (explaining that the term "civil action" was substituted in both Sections 1331 and 1441 to be in harmony with Fed. R. Civ. P. 2). And Rule 2 in turn makes clear that the phrase "civil action" has the broadest possible scope, including any action that a district court might hear: "There shall be one form of action to be known as a 'civil action.'" Fed. R. Civ. P. 2.

These historical underpinnings show that ICS's claims —the state-law claims as well as the federal ones— squarely present a "civil action" within the meaning of Sections 1331 and 1441. The decisionmaking responsibilities to be exercised by the state court in which the

complaints were filed were not of an executive nature but were incontestably judicial in nature, and were exercised after a final decision had been rendered by the Landmarks Commission. The proceeding was civil rather than criminal. In fact, the particular statutory procedure at issue here—the statutory equivalent of a common-law certiorari action—is a familiar judicial procedure.[21] In *Upshur*, for example, the Court noted that judicial review of a property valuation may take the form of a certiorari proceeding: "the legality and constitutionality of taxes and assessments may be subjected to judicial examination in various ways, [including] by certiorari." 135 U.S. at 473. Accord *Degge v. Hitchcock*, 229 U.S. 162, 170-71 (1913) (common law writ of certiorari as a means of appealing final decision of inferior tribunal where there "otherwise would be a denial of justice"). Cf. *Ames v. Kansas*, 111 U.S. at 461, 472 (statutory action lying in quo warranto was a "civil action" within federal jurisdiction and removable). Thus, ICS's complaints constituted a "civil action."

All told, ICS's complaints were civil actions within original jurisdiction and could therefore be removed. Indeed, the court of appeals doubted this conclusion for only one reason: some—although not all—of the state-law claims pleaded in ICS's complaints require the reviewing court to give deference to the Landmarks Commission's decisions. See Pet. App. 11a, 19a.[22] While the

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[21] Under Illinois law, the "substantial differences that at one time existed [between certiorari and statutory administrative review] have been all but obliterated." *Smith v. Department of Public Aid*, 67 Ill. 2d 529, 541, 367 N.E.2d 1286, 1293 (1977).

[22] Under Illinois law, the court determines whether the agency's determination was "arbitrary, unreasonable or capricious." *Monsanto Co. v. Pollution Control Board*, 67 Ill. 2d 276, 289, 367 N.E.2d 684, 689 (1977). See also *Hanrahan v. Williams*, 174 Ill. 2d 268, 272-73, 673 N.E.2d 251, 253-54 (1996). Findings of fact are reviewed deferentially but will be reversed if contrary to "the manifest weight of the evidence." *Monsanto*, 67 Ill. 2d at 289, 367

court of appeals was correct about the standard of review for some of the claims, it erred in finding that the scope of review is determinative of removal jurisdiction.

This Court, in prior decisions considering whether federal jurisdiction existed, has not worried about whether review of a state administrative proceeding under state law was de novo or deferential. For example, in *Commisioners of Road Improvement District No. 2*, the Court noted that the assessment suit was "to declare and enforce a liability of lands and their owners as it stands on present and past facts under a law and rules already made by the legislature and administrative officers." 257 U.S. at 554. Thus the Court allowed removal of an action challenging the decision of a county assessment board without inquiry into whether deference to the board's judgment was required. And the Court's opinion in *Stude* does not even mention the standard of review of the valuation proceeding.[23] The courts of appeals also have not, until recently, been concerned about this issue. In the leading case, *Range Oil Supply Co. v. Chicago, R.I. & P.R. Co.*, 248 F.2d 477 (8th Cir. 1957), the court held that Range Oil's state action seeking to set aside a state railroad commission's order as unlawful and unreasonable was removable as a "civil action" within the district court's "original jurisdiction." See *id.* at 478-79. See also *Linwood v. Board of Education*, 463 F.2d 763, 770 (7th Cir.), cert. denied, 409 U.S. 1027 (1972). Indeed the commentators have taken the holding of *Range Oil Supply* as settled law. See 1A James W. Moore, MOORE'S FEDERAL PRACTICE ¶ 0.157 [4.-3] at 73-74 (2d ed. 1996); 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3721 at 206-07 (1985).[24]

The most potent reason to reject the holding of the court of appeals, however, is that there is nothing in the text of the applicable jurisdictional provisions that supports the conclusion that while de novo review proceedings are "civil actions" within "original jurisdiction," on-the-record review actions are not. Moreover, such a conclusion would be in the teeth of the holding in *Califano v. Sanders*, in which precisely the type of review that the court below considered "appellate review" outside the competence of a district court was held to constitute a "civil action" within "original jurisdiction" under Section 1331. ICS has never suggested that *Califano v. Sanders* should be overruled. Nor should it be; Congress has not seen fit to revise the pertinent jurisdictional statutes in the two decades since that decision, and if *Califano v. Sanders* were to be overruled, a vast quantity of federal administrative litigation would prove jurisdictionally defective, since, as the Court there noted, the APA itself does not grant jurisdiction to the district courts. See 430 U.S. at 105. Nor is there anything in the relevant statutes to suggest that a district court can provide appellate style review when the decision of a federal agency is to be reviewed under federal law, but not when a decision of

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N.E.2d at 689. Questions of law are reviewed de novo. See *Branson v. Department of Revenue*, 168 Ill. 2d 247, 254, 659 N.E.2d 961, 965 (1995); *Envirite Corp. v. Illinois Environmental Protection Agency*, 158 Ill. 2d 210, 214, 632 N.E.2d 1035, 1037 (1994). And on constitutional claims, no deference need be given even on the facts since additional evidence can be proffered to the reviewing court. See *Stratton*, 133 Ill. 2d at 428-30, 551 N.E.2d at 646.

[23] *Stude* was a de novo proceding, since Iowa law provided that the action was one that would be " 'tried as in an action by ordinary proceedings.' " 346 U.S. at 576 (quoting Iowa Code § 472.21). For this reason as well, the language in the opinion concerning "appellate review" of a state agency's findings has nothing to do with a deferential scope of review. In any event, if *Stude* could be read to bar even de novo review of administrative decisions, it would have been overruled by *Horton*.

[24] And indeed it was for nearly four decades, until the two appellate decisions on which the court below relied. See *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995); *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995).

a state or local agency is to be reviewed under state law. A case seeking on-the-record administrative review, thus, does not seek the type of judicial review that federal courts are not competent to provide.

C. Even The Presence Of State-Law Claims Not Within Original Or Supplemental Jurisdiction Does Not Defeat Removal.

Even if federal courts are forbidden to provide on-the-record review of agency decisions under state law, that does not explain why the court of appeals could properly order the entire case—including ICS's constitutional claims seeking de novo review—remanded to state court. No decision of this Court—and nothing in any statute—suggests that joining claims that are not within original federal jurisdiction to claims that are defeats removal. To the contrary, as we explain above, both the removal and supplemental jurisdiction statutes permit federal jurisdiction to be exercised when state and federal claims are joined, and authorize, at most, remand to state court of only those claims on which state law predominates.

To reach the result that it did, the court of appeals relied on its prior opinion in *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994), in which the court had held that a case containing claims barred by the Eleventh Amendment is non-removable because the removal statute " 'only authorizes the removal of *actions* that are within the original jurisdiction of the federal courts.' " Pet. App. 21a (emphasis in original) (quoting *Frances J.*, 19 F.3d at 340). But the applicable jurisdictional framework here is much different from that in cases in which the removed case contains claims barred by the Eleventh Amendment. The Eleventh Amendment is an affirmative jurisdictional bar to the exercise of federal jurisdiction over claims against States, and it thus limits the exercise of pendent (and now supplemental jurisdiction) no less than any other type of federal jurisdiction. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117-21 (1984). Here, there is no

similar jurisdictional bar. The Eleventh Amendment does not apply here; this case involves only a decision of a local government agency. See, *e.g.*, *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977). Far from erecting any jurisdictional bar, Congress, in Section 1367(a), has affirmatively authorized the exercise of federal jurisdiction over nonfederal claims that arise from the same nucleus of fact. Indeed, in Section 1441(c), Congress has authorized removal even when the federal and nonfederal claims are unrelated.

Moreover, the judgment below—requiring remand of the entire case rather than only ICS's on-the-record administrative review claims—misconstrues the jurisdictional statutes applicable to this case. The court of appeals held that removal is proper only if the action as a whole falls within federal jurisdiction, and that this requirement applies to both Sections 1441(a) and 1441(c). See Pet. App. 21a-23a. But as we explain in Part I.A above, the phrase "civil action" within "original jurisdiction" under both the federal-question and removal statutes has long been construed to require only that some claims in the action fall within original federal jurisdiction, not that all claims do. The doctrines of pendent and supplemental jurisdiction are based on just this point.

Even Eleventh Amendment jurisprudence recognizes this; the Court has never held that the presence of some claims that are barred by the Eleventh Amendment defeats federal jurisdiction over the entire action. For example, in *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court held that portions of a federal decree that required a state agency to make retroactive payments of public assistance benefits were barred by the Eleventh Amendment, but the Court also held that the district court had jurisdiction to grant purely prospective relief. See *id.* at 667-71. Similarly, in *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam), the Court held that claims against the State and its board of corrections were barred by the Eleventh Amendment and should have been dismissed, but

it did not disturb the balance of the judgment awarding prospective relief against state officials. See *id.* at 782.[25] These decisions preclude the court of appeals' view that if some claims in a complaint are jurisdictionally barred, federal jurisdiction over the entire action is defeated.[26]

D. There Is No Policy Reason To Overcome The Plain Statutory Language And Its History.

Because there is nothing in the jurisdictional statutes to justify an exception from federal jurisdiction for state-law administrative review claims that are reviewed on the record—much less any basis for remanding an entire case in which such a claim is presented—such an exception can only be based on some nonstatutory policy sufficiently powerful to defeat the plain language of the statutes.

To date, this Court has recognized only two blanket exceptions to federal jurisdiction not supported by the text of an applicable jurisdictional statute. These two—domestic relations and probate—exist because the Court has hewed to venerable precedents rendering those types

[25] For just these reasons, the rule announced in *Frances J.* has not received universal support. While one circuit has reached the same result, see *McKay v. Boyd Construction Co.*, 769 F.2d 1084, 1086-87 (5th Cir. 1985), two other circuits have rejected that approach, see *Kruse v. Hawai'i*, 68 F.3d 331, 334-35 (9th Cir. 1995); *Henry v. Metropolitan Sewer District*, 922 F.2d 332, 336-39 (6th Cir. 1990).

[26] Even apart from this error of statutory construction, it is doubtful that *Frances J.* was correctly decided. In that case as in all others in which this question will arise, the State itself removed the case to federal court. Despite the Eleventh Amendment, "the Court consistently has held that a State may consent to suit against it in federal court." *Pennhurst*, 465 U.S. at 99. In particular, when a State chooses to prosecute a claim in federal court, it waives Eleventh Amendment immunity. See *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). It is quite unclear why a State's decision to remove a case against it to federal court should not fall within this rule.

of cases outside federal jurisdiction. See *Ankenbrandt v. Richards*, 504 U.S. 689, 693-94 (1992); *Markham v. Allen*, 326 U.S. 490, 494 (1946). In *Ankenbrandt*, the Court explained that the domestic relations exception was grounded in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859), the Court's "longstanding and well-known construction" of the diversity jurisdiction statute as excluding cases involving the issuance of decrees of divorce, alimony, and child custody, and Congress's acquiescence in that construction. See 504 U.S. at 700-01, 703. As for the probate exception, it comes from an equally old line of cases in which the Court concluded that it had no jurisdiction over cases alleging claims of a purely probate nature, such as probating a will or administering an estate. See *Markham*, 326 U.S. at 494. Both exceptions are construed narrowly. The domestic relations exception bars actions seeking issuance of divorce, alimony, or custody decrees, but permits suits involving related matters (see *Akenbrandt*, 504 U.S. at 701-04); the probate exception bars only actions involving the administration of an estate, but permits claims to be made "in favor of creditors, legatees and heirs" against an estate as long as there is no interference with probate proceedings (see *Markham*, 326 U.S. at 493-95).[27]

There surely is no similar rule that prohibits the extension of federal jurisdiction to cases challenging the decisions of state administrative agencies. In *New Orleans Public Service, Inc. v. Council of City of New Orleans*,

[27] And even these exceptions are applied not to federal question jurisdiction, but to diversity jurisdiction. In cases where these exceptions ordinarily might foreclose jurisdiction over state-law claims, the lower federal courts have still heard constitutional claims under federal-question jurisdiction. See, *e.g.*, *Agg v. Flanagan*, 855 F.2d 336, 339 (6th Cir. 1988) (court had jurisdiction to hear civil rights claims challenging State's method of determining and enforcing child custody payments); *Franks v. Smith*, 717 F.2d 183, 185-86 (5th Cir. 1983) (court could decide Fourth Amendment claim arising in child custody context).

491 U.S. 350 (1989) ("*NOPSI*"), the Court took pains to point out that federal jurisdiction existed over an action challenging a ratemaking decision of the council, since the pertinent jurisdictional statutes contained no exception to federal jurisdiction for such cases. See *id.* at 358-59, 372-73. Indeed, we explain in Part II.B above that this Court has repeatedly upheld the exercise of federal jurisdiction in cases in which the decisions of state agencies were challenged on state-law grounds.

The only conceivable basis for a nonstatutory exception to federal jurisdiction over a case seeking review on-the-record of a decision of a state or local agency is some federalism-based policy that endeavors to avoid entangling the federal courts in sensitive issues of state law. But this Court has never recognized such an exception to federal jurisdiction. In fact, in *Schmidt v. Oakland Unified School District*, 457 U.S. 594 (1982) (per curiam), the Court held that it was an "abuse of discretion" to refuse to exercise pendent jurisdiction over a state-law challenge to a contract-bidding program based on the court's perception that the state-law question was "sensitive." *Id.* at 594-95.

To be sure, there are circumstances where the federal courts should abstain from exercising jurisdiction over a state-law issue presented to them. But the Court's abstention jurisprudence in fact demonstrates the impropriety of the administrative law exception to federal jurisdiction recognized by the court of appeals here. In its cases considering when federal courts should refrain from hearing cases involving state-law questions, the Court has never recognized an exception to federal jurisdiction, but instead permitted abstention from the exercise of jurisdiction under certain demanding tests.

Burford v. Sun Oil Co., 319 U.S. 315 (1943), for example, involved a challenge to an award by the Texas Railroad Commission of a permit to drill oil wells. See *id.* at 317. The Court assumed that it had federal jurisdiction over the action (and did not even discuss whether the case would entail deferential or de novo review of the agency decision). See *id.* at 317-18. The question framed by the Court was not whether federal jurisdiction existed, but whether, assuming federal jurisdiction did exist, the federal court should exercise that jurisdiction where doing so would interfere with a complex, specially designed state regulatory system. See *id.* at 318-32.

As *Burford* abstention has evolved, it has permitted "a federal court to dismiss a case only if it presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar,' or if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1726 (1996) (quoting *NOPSI*, 491 U.S. at 361, in turn quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)). Even then, as the Court reiterated in *Quackenbush*, its most recent *Burford* abstention decision, the *Burford* doctrine does not deprive the district courts of jurisdiction. See *id.* at 1720-21. See also *id.* at 1728 (Scalia, J., concurring) (the Court is not "empowered to decide for itself when congressionally decreed jurisdiction constitutes a 'serious affront [to federalism]' and when it does not").

The other type of abstention applicable when a federal court is asked to decide a question of state law makes even clearer the impropriety of the jurisdictional exception created by the court of appeals. In *Railway Commision v. Pullman Co.*, 312 U.S. 496 (1941), the Court held that a federal court should stay proceedings when a case presents a federal constututional challenge to a state enactment that might become unnecessary to decide should a state tribunal construe it in the plantiff's favor. See *id.* at 499-502. *Pullman* abstention is accordingly

proper only when the state or local enactment is fairly susceptible to a limiting construction that would eliminate the federal constitutional claim. See, *e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 468 (1987); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236-37 & n.4 (1984). But even when *Pullman* abstention is appropriate, the federal court may still exercise its jurisdiction since a plaintiff who withholds his federal claims during state-court procedings is entitled to return with them to federal court should he need to do so. See *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 417-18 (1964).[28]

Thus, even when quite sensitive issues of state law are present, the *Burford* and *Pullman* abstention cases make clear that there is no exception to the existence of federal jurisdiction, but only a rule against its exercise in carefully circumscribed circumstances. And the sensitive elements justifying either type of abstention simply will not be present in many—if not most—state administrative review claims that are reviewed on the record. As we explain above, because Illinois law provides for de novo review of questions of law—including constitutional issues—deferential review is limited to questions of fact. See, *e.g.*, *Branson v. Department of Revenue*, 168 Ill. 2d 247, 254, 659 N.E.2d 961, 965 (1995); *Stratton*, 133 Ill. 2d at 429-300, 551 N.E.2d at 646-47. Such factual issues will rarely present circumstances that would lead a court to conclude that the issue was too sensitive for decision by a federal court.

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[28] In a related abstention doctrine, the Court has announced that abstention may be appropriate in eminent domain proceedings that involve sensitive city-state relationships or an uninterpreted state statute of questionable constitutionality. See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959). But this doctrine, like *Pullman* abstention, merely provides for staying the exercise of federal jurisdiction until uncertain state-law issues are resolved in state court; there is no abdication of jurisdiction. See *Quackenbush*, 116 S. Ct. at 1722-23.

In short, nothing inherent in the removal of state administrative review claims to federal court provides any basis for creating a new exclusion from federal jurisdiction for all such claims that are reviewed deferentially. Federalism concerns may sometimes justify a federal court's abstention, but they surely do not justify the holding below.

Indeed, viewed through the lens of federalism, the exception to federal jurisdiction recognized by the court of appeals is especially unjustified. Excluding state and local government defendants from federal court whenever the plaintiff asserts a state-law claim that is reviewed on the record would be anomalous, at best. A federal plaintiff willing to forgo its deferential claims would still be welcome in federal court. This option—not available to defendants—means a plaintiff such as ICS wishing a federal forum to litigate the federal questions that arise from an administrative review decision could obtain it by filing a civil rights action within federal-question jurisdiction containing only de novo attacks on an agency's decision. It is surely a strange brand of federalism that would limit only the ability of state and local agencies to obtain a federal forum when that is where they choose to defend their administrative actions, while providing those who wish to undermine those decisions with greater ability to select a federal forum. And it is even a stranger brand of federalism that permits federal courts to review the decisions of state and local agencies de novo—as in *Horton*—but prohibits federal courts from giving those decisions the deference that principles of federalism would seem to support.

The decision below also gives rise to anomalous results for plaintiffs who wish a federal forum. Because the court of appeals has concluded that a district court may not hear on-the-record review claims, plaintiffs can preserve their right to a federal forum only by initiating parallel federal and state litigation, in which only their

de novo claims can be adjudicated in the federal proceeding. Surely this Court should not encourage such wasteful duplication. Moreover, in diversity cases, when the agency seeks on-the-record review in state court, nonresident defendants will lose the right to remove and will be left to the mercy of the state court system in situations where Congress has granted them a right to remove as protection against local prejudices. See 28 U.S.C. § 1441 (b).[29]

But the most glaring problem with a rule that the presence of state-law, on-the-record, administrative review claims in a complaint that pleads a federal question defeats removal is that it denies the defendant its statutory right to remove to a federal forum on grounds not specified in any jurisdictional statute. Even worse, it defeats removal of the federal as well as the state-law claims, although there is no policy reason to refuse federal jurisdiction over federal claims merely because they are joined with state-law claims. No decision of this Court suggests that the right to removal can be defeated merely because applicable state law does not provide for de novo review. Nor has any decision of this Court or any statute ever suggested that the district courts are not competent to provide on-the-record and deferential review of agency decisions—indeed *Califano v. Sanders* is squarely inconsistent with any such suggestion.

"Congress [has] [n]ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976). That is because "Congress, and not the judiciary, defines

[29] In fact, the two decisions on which the court of appeals primarily relied here were diversity cases in which the right of an out-of-state defendant to remove was defeated by this administrative review exception. See Pet. App. 11a-13a.

the scope of federal jurisdiction within the constitutionally permissible bounds." *NOPSI*, 491 U.S. at 359. As this Court has explained:

> When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved, which, by law, brings the case within the jurisdiction of a Federal Court.

Wilcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) (citation omitted). Here, the City removed these actions because ICS's claims fell within the original and supplemental jurisdiction of the district court. The court below failed to exercise its jurisdiction and instead remanded both the federal and state-law claims. That decision was incorrect and should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 96-910

IN THE

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OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Does a federal district court, as a court of original jurisdiction, have jurisdiction to conduct appellate-like review of municipal administrative agency decisions, where a state-court complaint for administrative review contains some federal constitutional allegations?

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RESPONDENTS' BRIEF ON THE MERITS

Respondents, the International College of Surgeons, the United States Section of the International College of Surgeons, and Robin Construction Corporation (hereinafter the "College"), submit this brief as respondents.

STATEMENT

Except to the extent that it mischaracterizes the holding of the Seventh Circuit, the City's Statement is correct, but incomplete. In addition to the two complaints that sought judicial review of the Chicago Landmarks Commission's decision, the College also filed a Complaint for Declaratory Judgment challenging the Chicago City Council's rejection of a permit for

development under the Lake Michigan and Chicago Lakefront Protection Ordinance ("Lakefront Protection Ordinance"). *See* Pet. App. at 4a. Unlike the Landmarks Ordinance, which mandates that final decisions of the Commission be reviewed under the Illinois Administrative Review Act, 735 ILCS §§ 5/3-101 to 5/3-113 ("IARA"), the Lakefront Protection Ordinance did not provide any stated means for judicial review of City Council decisions. *Compare* J.A. 173, 175-76, Municipal Code of Chicago ("Municipal Code") §§ 2-120-810, 2-120-860 *with* Municipal Code §§ 16-4-010 *et seq.* This third case was filed in district court after that court had denied the College's motion to remand the first Complaint for Administrative Review to state court. *See* Pet. App. at 4a.

After consolidating the three cases, the district court stayed the third case pending disposition of the Complaints for Administrative Review. When the district court entered summary judgment in the City's favor on the Complaints for Administrative Review, it dismissed the third case with prejudice as moot, but with leave to reinstate if its judgment in the two administrative review cases was vacated, reversed or remanded on appeal. *See* Pet. App. at 93a. The College properly filed a notice of appeal in all three cases. Thus, when the Seventh Circuit reversed and remanded the College's administrative review cases, it also remanded the third case for "appropriate treatment." Pet. App. at 23a n.15. The declaratory judgment action is, therefore, back before the district court awaiting final resolution of this proceeding.

The City mischaracterizes the Seventh Circuit's decision. The court of appeals held that the College's Complaints for Administrative Review are not civil actions of which the district courts have original jurisdiction within the meaning of the removal statutes. *See* Pet. App. at 23a. Removal of the College's complaints is therefore barred; the Seventh Circuit remanded the complaints to the Circuit Court of Cook County, Illinois. *See id.* Even though the Seventh Circuit recognized the presence of federal constitutional claims in the College's complaints, the court expressly rejected the City's argument that

these allegations should be viewed as separate claims from the Illinois administrative review appeal. *See* Pet. App. at 22a. Indeed, the Seventh Circuit explicitly held that the College's federal constitutional claims, contained within its complaints for Illinois administrative review, do not convert the essential nature of this case—a statutory action under the Illinois Administrative Review Act—into a cause of action arising under federal law. *See id.*

SUMMARY OF ARGUMENT

This Court should reject the City's attempt to "federalize" state and local administrative appeals so as to allow the universal removal of garden-variety appeals from state or local administrative decisions. The City wrongly contends that a complaint for administrative review of a municipal agency decision may be removed to federal court so long as such a complaint contains a federal constitutional allegation, no matter how tangential.

While this Court has not decided a case in which a party has attempted to remove an on-the-record state or local administrative appeal, this Court's modern decisions make clear that an inquiry as to the standard of review to be employed by the state court is crucial in determining whether a case is removable. Drawing on this precedent, circuits that have squarely addressed the issue have held that federal district courts are without jurisdiction to conduct on-the-record appellate review of the final decisions of state or local administrative agencies.

The City's supplemental jurisdiction argument —purportedly based on the "plain language" of that statute—misses the point. The City ignores the fact that the plain language of all the jurisdictional statutes at issue presupposes the existence of a "civil action" of which the district courts have original jurisdiction. This case arises under the Municipal Code of Chicago and the IARA, which provide for judicial review of these issues. It is not by any means a civil rights action. All

the federal issues raised are inextricably intertwined with Illinois' administrative review scheme.

Finally, notions of comity and federalism militate against federal court assumption of state administrative appeals. Even if the district court properly had jurisdiction over the College's administrative appeals, it should have remanded the case to the Circuit Court of Cook County on abstention grounds. This case contains state law claims that relate to Chicago's comprehensive municipal ordinance on landmarks and implicate purely local policies—indeed, the Landmarks Ordinance, by its very nature, relates wholly to local concerns. Land use cases are matters peculiarly within the jurisdiction of states and municipalities. The instant action also presents important and unsettled questions of state law that must be decided before the federal constitutional issues are even reached. The issues of Illinois constitutional law raised by the College have never been decided by Illinois appellate courts. Moreover, Illinois courts have never had an opportunity to interpret the provisions of the Landmarks Ordinance at issue herein.

ARGUMENT

Since at least 1890, courts have inquired as to the proper "line of demarcation" between what does and does not constitute a removable suit or "civil action." *Upshur County v. Rich*, 135 U.S. 467, 472 (1890). In *Upshur*, the Court established that a proceeding before a body acting in an administrative capacity, even if that body is termed a "court," is not removable. *Id.* at 477. The Court later decided that administrative review cases that seek trials *de novo* in the state district or circuit court are removable. *See Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 354-55 (1961); *Chicago, Rock Island & Pac. R.R. Co. v. Stude*, 346 U.S. 574, 578-79 (1954). The Court has not had the opportunity to decide the precise question presented in this case: whether a state administrative appeal that seeks on-the-record, deferential review of a municipal agency determination can be properly removed. This Court should side with the weight of

modern precedent and well-settled notions of federalism and hold that such an action cannot be removed.

I. FEDERAL DISTRICT COURTS DO NOT HAVE JURISDICTION TO CONDUCT APPELLATE REVIEW OF STATE AGENCY DECISIONS.

A. Courts Must Determine The Nature Of Review To Be Applied In State Court.

The Seventh Circuit correctly concluded that the College's Complaints for Administrative Review, which were statutory appeals from municipal administrative decisions filed under the IARA, did not constitute "civil actions" within the district court's "original jurisdiction" under 28 U.S.C. § 1441(a). The Seventh Circuit properly recognized, under the great weight of authority on point, that in deciding whether a complaint for administrative review is removable, a court must focus on the nature of the state judicial action and the standard of review to be applied by state courts.

Crucial to the Seventh Circuit's opinion were the Court's decisions in *Stude* and *Horton*. The Court stated in *Stude* and implied in *Horton* that federal district courts, as courts of original jurisdiction, cannot review on appeal findings of state agencies. *See Stude*, 346 U.S. at 581; *Horton*, 367 U.S. at 354-55. The City's selective application of *Stude* and *Horton* is devoid of merit.

In *Stude*, the railroad, pursuant to Iowa law, condemned certain land. 346 U.S. at 575-76. It appealed the local sheriff's award of compensation to the federal district court, invoking diversity of citizenship and seeking to limit the award. *Id.* at 577. The Court sustained dismissal of the action:

> The United States District Court . . . does not sit to review on appeal action taken administratively or judicially in a state proceeding. A state "legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal. . . ." The Iowa

> Code does not purport to authorize such an appeal, Congress has provided none by statute, and the Federal Rules of Civil Procedure make no such provision.

Stude, 346 U.S. at 581 (quoting *Burford v. Sun Oil*, 319 U.S. 315, 317 (1943)); *see also Department of Transp. & Devel. v. Beaird-Poulan, Inc.*, 449 U.S. 971, 973-74 (1980) (Rehnquist, J., dissenting from denial of certiorari).

The railroad also had sought review of the sheriff's decision by way of a second action in state court. *See Stude*, 346 U.S. at 577. Under Iowa administrative procedure, the railroad, as the party aggrieved by agency action, was entitled to a trial *de novo* in state court by filing a notice of appeal from the agency's action. *See id.* After filing its appeal in state court, the railroad attempted to remove the case to federal court. *See id.* The Court ultimately found that removal was improper because the railroad, as plaintiff in the case, could not remove, noting that "the proceeding before the sheriff is administrative until the appeal has been taken to the district court of the county." *Id.* at 578. However, the Court stated that once "the proceeding has reached the stage of a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court." *Id.* at 578-79.

The Court did not suggest in *Stude*, as the City seems to intimate (*see* Pet. Br. at 38 & n.23), that all agency action becomes a "civil action" upon its arrival for review in state court. Rather, the Court examined the nature of the state judicial proceeding at issue. The case removed from state court to the district court in *Stude* was a *de novo* proceeding "'tried [by the state court] as an action by ordinary proceedings.'" *Id.* at 576 (quoting Iowa Code § 472.21 (1950)).

In *Horton*, the Court held that a challenge to a Texas administrative determination on a worker's compensation claim could be filed in federal court as a "civil action" on grounds of diversity, but only because Texas law provided that such a

challenge "*is not an appellate proceeding*. . . . It is a trial *de novo* wholly without reference to what may have been decided by the [Texas Industrial Accident] Board." 367 U.S. at 354-55 (emphasis added). Again, the City effectively glosses over the Court's critical examination of the standard of review to be applied in the state proceeding.

The clear import of *Stude* and *Horton* is that, in deciding whether a complaint for administrative review is removable, a court must focus on the nature of the state judicial action. Rather than properly recognizing the teaching of these cases, the City relies on a host of opinions from the nineteenth and early twentieth century in which federal courts reviewed administrative decisions of state or local agencies. Pet. Br. at 33. The Court, in the nineteenth century, defined "civil action" (or the predecessor term "suit") broadly. *See, e.g., Upshur*, 135 U.S. at 475. The value of this early precedent, however, has been called seriously into question:

> [T]he proper application in the modern context of the 19th-Century Court precedent defining "civil action" is a matter not free from doubt. Those Courts could not possibly have envisioned the rise of populism, the demise of economic due process, and ultimately the advent of the New Deal, all of which radically changed economic life and governance in this society. Mirroring the federal model produced by the New Deal, a multitude of administrative agencies now permeate the ranks of state decisionmaking. In that context, we think it a legitimate question to wonder whether the Supreme Court and/or the Congress believe it appropriate to define expansively the term "civil action" so as to allow the universal removal of garden-variety appeals from state administrative action.

Greenberg v. Veteran, 710 F. Supp. 962, 971 n.8. (S.D.N.Y.), *rev'd on other grounds*, 889 F.2d 418 (2d Cir. 1989).[1]

[1] *Greenberg* involved the propriety of removal of a New York "Article 78" proceeding. 710 F. Supp. at 964. The district court

Most importantly, however, these early decisions are of dubious value in light of *Stude*, *Horton*, and their progeny because they do not address the standard of review to be employed in the state appeal. Indeed, drawing on *Stude* and *Horton*, the three most recent circuits squarely addressing the issue (including the court below) have held that federal district courts are without jurisdiction to conduct on-the-record appellate review of the findings of state or local administrative agencies. Forty pages into its brief on the merits, the City buries in a footnote the fact that, prior to the Seventh Circuit's decision in this case, both the Fourth Circuit and the First Circuit Courts of Appeal had held that an action seeking review of a state administrative agency's decision is not removable where state law provides for deferential review in state court of such a decision. Pet. Br. at 39 n.24; *see Fairfax County Redevelopment & Housing Auth. v. W.M. Schlosser Co.*, 64 F.3d 155, 158 (4th Cir. 1995); *Armistead v. C & M Transp., Inc.*, 49 F.3d 43, 47-48 & n.4 (1st Cir. 1995).

W.M. Schlosser concerned a contract dispute between W.M. Schlosser Co. and Fairfax County, Virginia. Schlosser brought a state administrative action against the County for failure to pay the full amount due under a construction contract. *See W.M. Schlosser*, 64 F.3d at 156. The administrative agency ruled in favor of Schlosser and ordered the County to pay the deficiency. *See id.* The County appealed the decision to a Virginia circuit court, pursuant to Virginia Code § 11-71. *See id.* Schlosser removed the appeal to federal court, alleging diversity jurisdiction. *See id.* Section 11-71 provided that, in reviewing administrative proceedings, "findings of fact shall be final and

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addressed removal under the little-used "refusal clause" of the civil rights removal statute, 28 U.S.C. § 1443(2), as well as under the general removal statute. *See id.* at 966-72. The court held that, even assuming such a case was removable, the case should be remanded on abstention grounds. *See id.* at 973-76. The Second Circuit reversed, addressing only the propriety of removal under the refusal clause, and holding such a case removable under that provision. *See Greenberg v. Veteran*, 889 F.2d 418, 422 (2d Cir. 1989).

conclusive and shall not be set aside unless the same are fraudulent or arbitrary and capricious." Va. Code Ann. § 11-71. The Fourth Circuit properly understood *Stude* and *Horton* to bar removal because there is no "civil action" when the reviewing court is required to give deference to state administrative proceedings. *W.M. Schlosser*, 64 F.3d at 158. In discussing its holding, the Fourth Circuit noted that "the district court is a court of original jurisdiction, not an appellate tribunal." *Id.*

Armistead involved an appeal from an award issued by Maine's Workers' Compensation Commission. *See Armistead*, 49 F.3d at 45. Removal to federal court there was "doubly barred" under 28 U.S.C. § 1445(c) (barring removal of state workers' compensation disputes) and because the appeal did not constitute a "civil action." *Id.* at 46. The First Circuit found that the "limited . . . appellate authority exercised by Maine courts over Commission proceedings" was inconsistent with the district courts' role as courts of original jurisdiction. *Id.* at 47 (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923)).[2]

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[2] The Seventh Circuit's opinion correctly emphasizes that numerous other courts, including the First, Second, Fourth, Fifth, Ninth and Tenth Circuits, have concluded, in various procedural contexts, that district courts are without jurisdiction to review on appeal the findings of state agencies. *See* Pet. App. at 15a n.10; *see, e.g., Labiche v. Louisiana Patients' Comp. Fund Oversight Bd.*, 69 F.3d 21, 22 (5th Cir. 1995) (per curiam) ("We have reviewed [the statutes fixing the jurisdiction of the federal courts] and none would authorize appellate review by a United States District Court of any actions taken by a state agency."); *Armistead*, 49 F.3d at 47-48 & n.4; *W.M. Schlosser*, 64 F.3d at 157-58 (collecting cases); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 11 (2d Cir. 1992) ("This Court lacks jurisdiction to hear [appellant's] claim that the [state agency's] substantive decision was arbitrary and capricious."); *Shell Oil Co. v. Train*, 585 F.2d 409, 414-15 (9th Cir. 1978) (holding that federal district court was without jurisdiction to review state agency denial of environmental permit); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 42 (1st Cir. 1972) ("To the extent that the federal district court would treat a case removed from the [state court] as a review of a[] [state] administrative decision by giving deference to the [agency's] determination . . . , this would place a federal court in an improper

Several district courts are in accord with the holdings and reasoning employed in *Armistead* and *W.M. Schlosser*. *See, e.g.*, *Matherly v. Las Vegas Valley Water Dist.*, 926 F. Supp. 990, 993-94 (D. Nev. 1996) (holding that appeal taken from an agency determination that affords only limited review of agency determination is not a removable civil action); *Greenberg*, 710 F. Supp. at 971 ("[I]t is beyond cavil that a statutory appeal of administrative state action, whether or not it involves diverse parties or a federal question, may not be filed in federal court. Following from that principle, we doubt that Congress intended the term 'civil action' under the removal statute to be so sponge-like as to allow its absorption of every conceivable type of proceeding involving appeal from state or municipal administrative action which touches upon a federal question. To believe otherwise is to suggest that Congress was ignorant of notions of comity and federalism that are such an important part of our constitutional and jurisprudential fabric.") (citation omitted); *Crivello v. Board of Adjustment*, 183 F. Supp. 826, 828 (D.N.J. 1960) (holding that deferential review of state administrative action, although nominally designated a "civil action at law," did not constitute a "civil action" under the removal statute within the court's "original jurisdiction"); *Collins v. Public Serv. Comm'n*, 129 F. Supp. 722 (W.D. Mo. 1955) (noting "doubts as to whether [a petition to review an order of state agency] constitutes a 'civil action'" and holding that such a proceeding is not "one of which the district courts of the United States have original jurisdiction within the meaning of the removal act").

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posture vis-a-vis a non-federal agency."); *Trapp v. Goetz*, 373 F.2d 380, 383 (10th Cir. 1966) ("[T]he United States District Court had no power to consider an appeal from the state administrative tribunal. Such a proceeding is not within its statutory jurisdiction."); *cf. Frison v. Franklin County Bd. of Educ.*, 596 F.2d 1192, 1194 (4th Cir. 1979) (noting that the district court should have declined pendent jurisdiction over state law claim because "it is essentially a petition for judicial review of state administrative action rather than a distinct claim for relief").

Rather than recognize this authority, the City instead relies on the Eighth Circuit's opinion in *Range Oil Supply Co. v. Chicago, Rock Island & Pacific Railroad*, 248 F.2d 477 (8th Cir. 1957). Pet. Br. at 38-39. The Seventh Circuit's opinion in this case makes clear that it was fully cognizant of *Range Oil*, but chose, as did the Fourth Circuit in *W.M. Schlosser*, not to follow its faulty reasoning. *See* Pet. App. at 15a-16a n.10; *W.M. Schlosser*, 64 F.3d at 158. Indeed, contrary to the City's assertions, *Range Oil* is an anomaly. In fact, as emphasized in *W.M. Schlosser*, *Range Oil* failed to follow this Court's decisions in *Stude* and *Horton*. *See W.M. Schlosser*, 64 F.3d at 158.

It is a fundamental principle of statutory construction that courts must give effect to every clause and word of a statute. *See Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997). In interpreting the predecessor to 28 U.S.C. § 1331, the Court has emphasized: "The jurisdiction possessed by the District Courts is *strictly original*." *Rooker*, 263 U.S. at 416 (emphasis added). The City's position—and its heavy reliance on *Range Oil*—renders the words "original jurisdiction" in the pertinent jurisdictional statutes completely superfluous.

As the Seventh Circuit emphasized, the court in *Range Oil* failed to consider that the diversity statute vests only "original" and not "appellate" jurisdiction in the district courts. Pet. App. at 15a-16a n.10; *see also Stude*, 346 U.S. at 581; *Burford*, 319 U.S. at 317; *W.M. Schlosser*, 64 F.3d at 158. The Seventh Circuit correctly concluded: "The *Range Oil* court equates 'original jurisdiction' with the prerequisites of diversity jurisdiction, rendering the former requirement meaningless." Pet. App. at 15a-16a n.10.

B. Federal Administrative Law Principles Do Not Apply To This Illinois Administrative Review Case. Sound Policy Reasons Mandate That District Courts Decline To Hear State Administrative Appeals.

The City, by asserting that the holding below cannot be reconciled with federal question jurisdiction over actions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, because district courts provide deferential review of federal agency action, effectively ignores the broad policy favoring judicial review under the APA and dismisses well-settled notions of comity and federalism. Quite simply, the APA "is of course not applicable to state administrative agencies." *Beaird-Poulan*, 449 U.S. at 973. Nor should the broad policies favoring judicial review of federal agency action, subject only to statutory limitations,[3] apply to federal district court review of state or local agency action, allowing wholesale removal of state administrative appeals.

That district courts give deference to federal agency findings in non-statutory review actions does not warrant the conclusion that district courts are competent to provide such review of state or municipal agency decisions. Indeed, courts do

[3] *See Califano v. Sanders*, 430 U.S. 99 (1977). In *Califano*, the Court held that the APA is not an implied grant of subject matter jurisdiction to review agency actions. *Id.* at 104. The Court emphasized, however, that the APA "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Id.* So-called non-statutory review under the APA, then, in keeping with this broad policy, provides a stopgap mode of review when federal administrative action is judicially reviewable but no statute specifies the route by which to obtain review. *See, e.g., United States v. Fausto*, 484 U.S. 439, 444 (1988); *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985). In light of this policy, the Court has emphasized that the APA's "generous review provisions" must be given a "hospitable interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). The justifications for federal review of federal agency action do not exist in the context of state administrative agencies because, like here, state law prescribes the procedures for judicial review.

not find that these roles are irreconcilable. In *Hameetman*, for example, the Seventh Circuit characterized a non-statutory review action as a suit resembling "an equity suit but . . . actually a review proceeding rather than an original proceeding," while at the same time recognizing that "[f]ederal courts have no general appellate authority over state courts or state agencies." *Hameetman*, 776 F.2d at 640. Thus, while the court found that a district court properly could hear a section 1983 challenge to state administrative action and grant injunctive relief against violations of federal law, the court emphasized that a federal judge has no power to "remand" a case to a state agency, as it could in the federal context. *Id.*[4] Indeed, leading commentators note that federal courts may sometimes review state agency action, "*but the review is for the limited purpose of determining whether that action did indeed violate federal law.*" 3 Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, § 18.7 at 197 (3d ed. 1994) (emphasis added).

If the City's position were adopted, the federal district courts would be required to provide "non-statutory review" of every state administrative decision where a federal constitutional issue was raised.[5] This is a wholly inappropriate allocation of federal and state judicial resources—something the federal APA itself was designed to eliminate with respect to federal administrative review,[6] and not contemplated by Congress or the Court in *Califano*.

[4] The College's prayers for relief in their Complaints for Administrative Review asked for "reversal" of the decisions of the Landmarks Commission (*see* J.A. at 35, 79)—relief that the federal district court could not possibly provide.

[5] The *Amici Curiae* National Trust for Historic Preservation, National Alliance of Preservation Commissions, and Landmarks Preservation Council of Illinois ("National Trust *Amici*") argue that practically every historic preservation case involves federal constitutional law and, therefore, only federal courts are equipped to resolve such cases. *See* National Trust *Amici* Br. at 10-11. If this argument is accepted, then every landmarks commission decision and zoning board decision soon will find its way into federal court.

[6] The legislative history of the APA illustrates that one goal

While under the *Erie* doctrine federal courts ascertain and apply state law, *see Salve Regina College v. Russell*, 499 U.S. 225, 238-39 (1991), federal court determination of the state law validity of state administrative action is qualitatively different. At a minimum, federal courts would be required to grapple with all manners of complex state regulations and state agency decisions—which state courts are better equipped to review. Take, for example, the wide variety of approaches taken by the states with respect to judicial review regarding questions of law alone:

> First there are those states that give extreme deference to agency actions. The states in this category seem to have adopted, either explicitly or implicitly, a straight reading of *Chevron* [*U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)], and afford great weight to agency determinations. At the other end of the spectrum are those states that grant no deference to agency action. . . . The third, and largest, group consists of states that vary the level of deference to agency action with the type of problem decided by the agency. A fourth group has no set rules as to the scope of judicial review on questions of law.

William A. McGrath et al., *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 763-73 (1991). In light of this array of standards to be applied, the City is incorrect when it argues that no policy reasons exist for treating state and

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Congress sought to achieve through the Act was a measure of uniformity in federal administrative procedures. H.R. Rep. No. 1980 (1946), *reprinted in* 1946 U.S.C.C.S. 1195, 1203-04. The Act sets forth detailed procedures for agency rulemakings, adjudications, hearings, and judicial review. *See* 5 U.S.C. §§ 701-706. With the institution of the Act, and the ensuing fifty years the federal courts have had to refine their review of federal agency actions, the federal courts are (presumably) now very capable in this area. This uniformity of procedure and first hand experience, however, does not exist with respect to federal review of state agency actions.

local agency decisions differently than federal agency decisions. *See* Pet. Br. at 11-12.[7]

II. SUPPLEMENTAL JURISDICTION PRINCIPLES DO NOT APPLY TO THIS CASE BECAUSE THE COLLEGE'S COMPLAINTS FOR ADMINISTRATIVE REVIEW DO NOT ARISE UNDER FEDERAL LAW.

The City argues at length that this appeal may be rather easily resolved by applying the well-settled principles of supplemental jurisdiction. *See, e.g.*, Pet. Br. at 10 ("The plain language of the supplemental jurisdiction statute makes clear that state-law claims may be heard in federal court under the district court's 'supplemental jurisdiction' as long as they are part of the same case or controversy."); *see also* Pet. Br. at 12, 14-15. Although the City offers an interesting exposition of the doctrine of pendent jurisdiction and its codification as supplemental jurisdiction under 28 U.S.C. § 1367, the City's entire discussion on this topic completely misses the point of this case.

A. The College's Complaints Arise Under Illinois Law.

The issue before the Court has absolutely nothing to do with pendent state claims arising out of a federal claim's common nucleus of operative facts. Instead, the critical question of the instant case asks whether the College's Complaints for Administrative Review under the IARA constitute a civil action of which the district courts of the United States have original jurisdiction.

Indeed, any discussion of supplemental jurisdiction necessarily presumes the existence of a "civil action." The plain language of 28 U.S.C. § 1367 provides:

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[7] In any event, should this Court decide that the opinion below somehow conflicts with *Califano*, the different state views on scope of review—as well as the vast differences in the organic laws, regulations and decisions of the large number of state administrative agencies—would present a morass of issues of statutory interpretation that would require abstention. *See infra* Part III.

> *[I]n any civil action of which the district courts have original jurisdiction*, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action with such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (emphasis added). The italicized phrase demonstrates that supplemental jurisdiction presumes that the case in question already falls within the original jurisdiction of the district courts. Such a presumption is inappropriate and, indeed, nonsensical in the case at bar. This case presumes nothing. It asks the more fundamental question whether the College's Complaints for Administrative Review even fall within the federal courts' original jurisdiction.

Under 28 U.S.C. § 1441, removal of a state complaint to federal court is proper where "the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). In this case, because diversity of citizenship is not alleged, the propriety of removal "turns on whether the case falls within the original 'federal question' jurisdiction of the federal courts." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

The propriety of removal, then, is tied to the original jurisdiction of the district courts; removal is proper only if the action originally could have been brought in federal court. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). If original jurisdiction is based upon the existence of a federal question, the complaint must "arise under" federal law. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983). Whether the complaint "arise[s] under" federal law can be determined only by reference to the "well-pleaded complaint." Under the "well-pleaded complaint" doctrine, federal law must create the cause of action or some substantial, disputed question of federal law must be an element of the plaintiff's claim. *See id.* at 27-28. The Court repeatedly has held that, in order for a claim to "arise under" the Constitution, law or treaties

of the United States, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974) (per curiam) (citations omitted).

In *Franchise Tax Board*, the Court observed that there is no "single, precise definition" of federal question jurisdiction; rather, "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." 463 U.S. at 8. Sixty-seven years earlier, Justice Holmes determined that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). The Court agreed in *Merrell Dow*: "The vast majority of cases brought under the general federal-question jurisdiction of federal courts are those in which the federal law creates the cause of action." 478 U.S. at 808.

The City asserts that the College's complaints "arise under" federal law solely because those complaints contain allegations that the Landmarks Commission violated the United States Constitution. The City states rather conclusively that "[t]he federal constitutional claims alleged in the administrative review complaints arose under federal law." Pet. Br. at 19. Yet recent precedent from the Court makes clear that federal question analysis—whether the College's complaints do or do not arise under federal law—cannot be analyzed so cursorily. *Merrell Dow* declared that even though the meaning of the term "arising under" may seem to extend to all cases that contain some federal allegation, the Court "has long construed the statutory grant of federal question jurisdiction as conferring a more limited power." 478 U.S. at 807.

The City cites *Franchise Tax Board* to distance this case from Justice Holmes' construction of federal question jurisdiction and to support its reasoning that the mere presence of federal allegations in the College's complaints satisfies the Court's "arising under" analysis. That reasoning, however, misstates the

law. *Merrell Dow*, which was decided three years after *Franchise Tax Board*, made clear that jurisdictional statements from *Franchise Tax Board* upon which the City relies must be read with caution: "*Franchise Tax Board* . . . did not purport to disturb the long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 809, 813.[8] Indeed, *Merrell Dow* explicitly eschews the City's interpretation of *Franchise Tax Board* and the superficial federal-question analysis in which the City engages: "Far from creating some kind of automatic test [for determining federal question jurisdiction], *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction." *Id.* at 814.

The instant case, then, poses the same issue that was addressed in *Merrell Dow*: "Whether jurisdiction may lie for the presence of a federal issue in a nonfederal cause of action . . . ." *Id.* at 810. To analyze the basis for jurisdiction here, the Court must engage, as both *Franchise Tax Board* and *Merrell Dow* suggest, in "principled, pragmatic distinctions" regarding the source of law that gave rise to the College's complaints, "a selective process which picks the substantial causes out of the

[8] The City states, "In *Franchise Tax Board*, the Court wrote that it has 'often held that a case arose under federal law where the vindication of a right under state law necessarily turned on some construction of federal law.'" Pet. Br. at 21-22 (quoting *Franchise Tax Bd.*, 463 U.S. at 9). With this support, the City concludes that the College's complaints, even though framed as a state administrative review action, still arise under federal law. *See* Pet. Br. at 23. *Merrell Dow*, however, instructs otherwise. Addressing the exact same language upon which the City relies, the Court in *Merrell Dow* writes: "Our actual holding in *Franchise Tax Board* demonstrates that this statement must be read with caution; the central issue presented in that case turned on the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982 ed.), but we nevertheless concluded that federal jurisdiction was lacking." 478 U.S. at 809. Regardless, then, of its arguments to the contrary, *Franchise Tax Board* offers the City little support.

web and lays the other ones aside." *Merrell Dow*, 478 U.S. at 813-14 (quoting *Franchise Tax Bd.*, 463 U.S. at 20-21).

Both of the College's Complaints for Administrative Review arise under Illinois—not federal—law. Indeed, the IARA provides "the exclusive method by which an aggrieved party may obtain judicial review of decisions made by certain administrative agencies in Illinois," including the Chicago Landmarks Commission. Pet. App. at 16a. As the Seventh Circuit determined, the IARA provides for judicial review of final decisions of those administrative agencies whose enabling legislation adopts, by express reference, the provisions of the IARA. *See* Pet. App. at 16a. The Landmarks Ordinance expressly provides that "final administrative decision[s] [are] appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act." J.A. 173, 175-76, Municipal Code §§ 2-120-810, 2-120-860; *see also* Pet. App. at 6a nn.5 & 6.

Furthermore, Illinois law is quite specific regarding the functions the courts may perform in reviewing an administrative decision: the circuit court may stay an administrative decision; order the agency to amend, complete, or file the record of the administrative proceeding; substitute, dismiss, or realign parties; affirm or reverse the agency's decision in whole or in part; remand the decision with proper instructions; or enter money judgments where appropriate. *See* 735 ILCS § 5/3-111. Moreover, as the Seventh Circuit noted, Illinois courts have construed strictly section 3-111 and have limited reviewing courts to exercising only those enumerated powers. *See* Pet. App. at 16a n.11 (collecting Illinois cases).

In addition, Illinois courts reviewing agency action under the IARA have the authority to rule on constitutional issues. *See* 735 ILCS § 5/3-110. As the Seventh Circuit expressly noted, the fundamental validity of the ordinance upon which the court proceeding is based may be challenged in a state suit for administrative review. *See Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1976); *Howard v. Lawton*, 175 N.E.2d 556,

557 (Ill. 1961); *Murray v. Board of Review of Peoria County*, 604 N.E.2d 1040, 1043 (Ill. App. Ct. 1992). "'To hold otherwise would result in piecemeal litigation by first requiring review of an administrative body's decision and then entertaining another action to test constitutionality brought on by such decision.'" Pet. App. at 17a (quoting *Howard*, 175 N.E.2d at 557).

This review of the Illinois law that gave rise to the College's Complaints for Administrative Review demonstrates that the instant case does not, as the City maintains, "arise under" federal law. Thus, the City's entire discussion of supplemental jurisdiction is a diversion. The City attempts to characterize the College's complaints as a claim for appellate-like administrative review coupled with removable federal questions. This view was squarely rejected by the Seventh Circuit and should be rejected here. *See* Pet. App. at 22a n.14 ("We cannot accept, therefore, the submission that, because the College's complaints contain several challenges to the Chicago Landmark Ordinance arising under the federal constitution, the district court's jurisdiction in this case may be premised on 28 U.S.C. § 1331, the federal question statute."). While the College's Complaints for Administrative Review contain federal constitutional allegations, those allegations are inextricably intertwined with matters grounded in state law and limited to the administrative record under the IARA. As the Fourth Circuit has recognized in the context of zoning and land use cases:

> Virtually all of these cases, when stripped of the cloak of their federal constitutional claims, are state law cases. The federal claims are really state law claims because it is either the zoning or land use decisions, decisional processes, or laws that are the bases for the plaintiffs' federal claims.

Pomponio v. Fauquier County Bd., 21 F.3d 1319, 1326 (4th Cir. 1994), *cert. denied*, 513 U.S. 870 (1994).

The Fourth Circuit's logic in *Pomponio* comports with the Seventh Circuit's reasoning in the instant case. *See* Pet. App. at

17a. Put simply, the College's Complaints for Administrative Review are state-law cases. The federal constitutional issues that the City attempts to isolate in order to assert federal jurisdiction do not convert the essential nature of this case—a statutory complaint under the IARA—into a federal question cause of action simply because it alleges some federal constitutional challenges to the Landmarks Commission's final decision.

B. The College's Complaints For Administrative Review Are Not Civil Rights Actions. The "Well-Pleaded Complaint" Doctrine Permits The College To Choose State Court Jurisdiction.

The City attempts to persuade the Court that the College's complaints present two causes of action, one federal and one state, both of which can be heard in federal court. *See* Pet. Br. at 26 ("[A]ll of [the College's] claims fall within federal jurisdiction—the federal claims within original jurisdiction and the state claims within supplemental jurisdiction.").[9] The City tries to persuade this Court that the College's Complaints for Administrative Review are no different than civil rights actions. Of course, the City never actually states, at least in the brief it submitted to this Court, that it sees the College's complaints as

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[9] The City apparently focuses on Judge Ripple's statement that the College's federal claims, "if brought alone, would be removable to federal court." Pet. App. at 20a; *see also* Pet. Br. at 13, 24. But rather than supporting the City's argument for federal jurisdiction, Judge Ripple's counter-factual statement underscores the particular state-based nature of the College's complaints. Judge Ripple, writing for the Seventh Circuit, specifically noted that the College's Complaints for Administrative Review, *including the federal claims alleged therein*, arose from the state statutory procedure for administrative review: "Illinois' administrative review procedure scheme permits an attack on the facial validity of the statute; such an attack can be brought independently of the administrative action or it may also be brought—*as it was here*—in the action for judicial review under the IARA." Pet. App. at 19a (emphasis added).

civil rights actions.[10] Nevertheless, the City's reliance on civil rights reasoning is obvious and, more importantly, misplaced. The College's complaints are simply not civil rights actions; the College has not fashioned its claims as a suit under 42 U.S.C. § 1983. Because the IARA provides Illinois courts the authority to resolve constitutional issues in the context of on-the-record administrative review, this distinction is crucial. *See* Pet. App. at 17a.

By now it is axiomatic that Congress passed section 1983 as a means to enforce in federal court the provisions of the Fourteenth Amendment. *Monroe v. Pape*, 365 U.S. 167, 171 (1961). The aim of Congress was unmistakable: "[Section 1983] provide[s] a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 174. *Monroe* makes clear that section 1983 "gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the [f]ederal courts." *Id.* at 178; *see also Collins v. City of Harker Heights*, 503 U.S. 115, 119 (1992) ("[Section 1983] provides the citizen with an effective remedy against those abuses of state power that violate federal law. . . ."); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) ("Title 42 U.S.C. § 1983 provides a remedy for

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[10] The City was more straightforward regarding its reliance on the logic of civil rights cases when it originally asserted the existence of federal jurisdiction over the College's complaints. *See* J.A. 11, Notice of Removal, United States District Court, No. 91 C 1587. There the City argued:

> This Court has original jurisdiction to hear suits to redress violations of rights guaranteed by the United States Constitution pursuant to 28 U.S.C. sections 1331 and 1343. Petition[ers] are entitled to remove this action pursuant to the provisions of 28 U.S.C. section 1441(b), *in that it appears from the face of plaintiffs' complaint that this is a civil rights complaint which arises under the United States Constitution, and the matter involves a federal question.*

Id. at 14-15 (emphasis added).

deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place 'under color of any statute, ordinance, regulation, custom, or usage, of any State. . . .'") (quoting 42 U.S.C. § 1983).

Moreover, in *Monell v. New York City Department of Social Services*, the Court held that Congress intended municipalities and other local governmental entities to be included among those persons to whom section 1983 applies. 436 U.S. 658, 690 (1978). At the same time, the Court made clear that municipalities and other local governmental entities may not be held liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691.

These basic principles of section 1983 suggest that the College might have brought a section 1983 action. The College deliberately chose, however, to seek judicial review of the Landmarks Commission's final decisions in state court pursuant to Chicago's Municipal Code and the IARA. The "well-pleaded complaint" doctrine permits the College to make this choice. This doctrine allows a plaintiff to avoid removal by tailoring his or her complaint to exclude certain claims. *See Caterpillar Inc.*, 482 U.S. at 399 ("[T]he plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court."); *Merrell Dow*, 478 U.S. at 804 n.6 ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."); *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) ("[T]he plaintiff is absolute master of what jurisdiction he will appeal to. . . ."); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon. . . ."). The "well-pleaded complaint" doctrine supports the College's decision to avail itself only of its state-based right to administrative review.

The City's mistaken dependence upon civil rights principles is exemplified by its reliance on *Bickerstaff Clay Products Co. v. Harris County*, 89 F.3d 1481 (11th Cir. 1996), and *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91 (1st Cir. 1977). *See* Pet. Br. at 16. The City introduces these

cases with the broad and, frankly, indefensible statement that "federal courts have universally held that there is federal jurisdiction over suits containing federal and state claims, including state-law challenges to the land-use decisions of local administrative agencies." Pet. Br. at 16. *Bickerstaff* and *Ortega Cabrera* are cited, then, for the proposition that supplemental jurisdiction is proper in local land-use cases where federal questions are also raised.[11]

Neither *Bickerstaff* nor *Ortega Cabrera* can fairly be characterized as arising under state administrative law. The crucial and fatal distinction between the College's Complaints for Administrative Review and *Bickerstaff* and *Ortega Cabrera* is that the latter cases were section 1983 actions, and this case was not. The Seventh Circuit explicitly noted that a section 1983 claim, if such a claim were included in the College's complaints, "is independent of the administrative review proceeding and is therefore plenary in its scope; the court is not confined by the administrative record." Pet. App. at 20a; *see also Hameetman*, 776 F.2d at 640 ("A suit under 42 U.S.C. § 1983 is not a mode of judicial review of a state administrative agency's or state court's action even if the plaintiff is complaining about a denial of due process in the proceedings before the agency or the court and is asking the federal court to enjoin the action."); *Stratton v. Wenona Community Unit Dist. No. 1*, 551 N.E.2d 640, 646 (Ill. 1990) ("[A] section 1983 action is not a review proceeding even when, as here, it challenges administrative action that has an adjudicative component."). Thus, an action under section 1983 and a suit for administrative review are completely different. Jurisdictional arguments based on section 1983 cases are simply out of place because the College's complaints arise under Illinois administrative review law.

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[11] The quoted language above cannot legitimately be described as the "holding" of either case, nor does it appear that the precise issue presented in this case was ever before the courts in *Bickerstaff* or *Ortega Cabrera*. Indeed, the City fails to cite a single case in which a federal court specifically assumed pendent or supplemental jurisdiction over an on-the-record state administrative appeal.

The City attempts to avoid the force of this argument by suggesting that the fundamental state-based nature of the College's claims—that is, that its Complaints for Administrative Review arise from Illinois' administrative scheme—is nothing more than artful pleading. *See* Pet. Br. at 20. The City urges this Court to "determine the real nature" of the College's complaints, regardless of how those complaints may be characterized. *See* Pet. Br. at 20 (quoting *Federated Dep't Stores, Inc. v. Mointie*, 452 U.S. 394, 397 n.2 (1981)).

The issue of federal question jurisdiction was not central to the *Federated Department Stores* decision. On the contrary, the entire discussion of jurisdiction on which the City relies is relegated to a single footnote in a seventeen page opinion. *See Federated Department Stores*, 452 U.S. at 397 n.2. Indeed, the opening line of the Court's opinion reads: "The only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata." *Id.* at 395.

The procedural posture of *Federated Department Stores* further undermines the relevance of that opinion. In that case, the plaintiffs first filed a federal action that was dismissed on its merits. *See id.* at 396. The plaintiffs chose not to appeal. *See id.* Subsequently the plaintiffs filed the identical action in state court. *See id.* "After an extensive review and analysis of the origins and substance" of the federal and state complaints, both the district court and the Ninth Circuit found that, given the identical nature of the plaintiffs' state claims to the previously dismissed federal claims, removal was proper. *Id.* at 396, 397 n.2. This procedural history illustrates why the Court was willing to uphold the essential federal nature of the plaintiffs' claims in *Federated Department Stores*. There the plaintiffs slyly sought to avoid the consequences of dismissal of their previous action.

No such subterfuge exists in the case at bar. On the contrary, the College has simply sought review of the administrative determinations of the Chicago Landmarks Commission as it was instructed to do by the very municipal

code that authorized the Commission's action. *See* J.A. 173, 175-76, Municipal Code §§ 2-120-810, 2-120-860 ("[The] final administrative decision[s] [are] appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act. . . ."); *see also* Pet. App. at 6a, nn.5 & 6. Despite this clear direction, the City would have this Court hold that this is essentially a federal cause of action. As discussed above, the "well-pleaded complaint" doctrine permits the College to "choose to have the cause heard in state court." *Caterpillar Inc.*, 482 U.S. at 399. Neither *Federated Department Stores* nor the undisputed history of this case indicates that the College has illegitimately avoided federal jurisdiction.

There can be no doubt that the College's complaints arose under the applicable state administrative review law. The College has not sought to avail itself of the civil rights statutes. The City's entire discussion of supplemental jurisdiction, then, is irrelevant because it is based on the erroneous premise that these were civil rights complaints. As discussed above, the mere presence of allegations of federal constitutional violations in its Complaints for Administrative Review does not transform the College's suit into an action arising under federal law. *See Merrell Dow*, 478 U.S. at 813.

C. The Logic Of *Frances J. v. Wright* Supports The Seventh Circuit's Holding That The Nature Of The College's Suit Precludes Federal Jurisdiction.

Equally unconvincing is the City's criticism of the Seventh Circuit's reliance on *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 876 (1994). The Seventh Circuit followed the reasoning of *Frances J.* to support the conclusion that the College's complaints, lacking the essential ingredients of a "civil action," should not be heard in federal court. *See* Pet. App. at 20a. The City stresses the obvious distinctions between *Frances J.* and the instant appeal to suggest that the Seventh Circuit analogy constitutes error. *See* Pet. Br. at 40-42. Nothing could be further from the truth. The City simply mischaracterizes the opinion below.

The Seventh Circuit explicitly recognized that *Frances J.* and the instant appeal presented different legal issues; Judge Ripple merely found the reasoning of *Frances J.* instructive. *See* Pet. App. at 22a ("Although the situation presented here is not identical in all respects to the situation presented in *Frances J.*, the basic reasoning of that case is applicable."). In *Frances J.*, the court was confronted with an attempt to remove a complaint that contained some claims barred by the Eleventh Amendment and the doctrine of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), along with other claims that were removable pursuant to 28 U.S.C. § 1441(a). The court concluded that the Eleventh Amendment barred the action from removal under either section 1441(a) or 1441(c). "By the plain meaning of section 1441(a), an action that contains claims barred by sovereign immunity, cannot, in whole or in part, be removed from the state courts to a federal forum because it is not an action within the original jurisdiction of the district courts." *Frances J.*, 19 F.3d at 340. Similarly, under section 1441(c), the court found that the plain language of the statute created an insuperable barrier to removal. *See id.* at n.4. Because the Eleventh Amendment and the *Hans* doctrine barred some of the claims from any adjudication in federal court, the district court then could not determine "all issues therein." *Id.* (quoting 28 U.S.C. § 1441(c)).

The court below legitimately found in *Frances J.* a useful analogy to the case before it. In *Frances J.*, the Seventh Circuit ultimately held that the allegations barred by the Eleventh Amendment transformed that case into something other than "a civil action of which the district courts have original jurisdiction." *See* Pet. App. at 22a. Because that case could no longer be considered "a civil action," then neither the removal statutes nor the "arising under" statutes lawfully could extend federal jurisdiction over it. *Id.* at 21a-22a.

The College does not dispute the City's argument that the instant action in no way implicates Eleventh Amendment jurisprudence. *See* Pet. Br. at 41. Nor does the College need to defend the holding of *Frances J.* or to enter into the complexities of *Hans v. Louisiana* and its progeny. It is rather surprising that

the City and the National Trust *Amici* suggest that the Court use the instant appeal as an opportunity to review *Frances J.* when Eleventh Amendment issues are not before the Court. *See* Pet. Cert. Petition at 18; National Trust *Amici* Br. at 21. Nevertheless, with such emphasis on the holding of *Frances J.*, the City overlooks Judge Ripple's fundamental reasoning.

Frances J. is instructive because, like the instant appeal, it represents a situation where the nature of the action excluded the case from federal jurisdiction. In *Frances J.*, the allegations barred by the Eleventh Amendment precluded federal jurisdiction; here, the College's state-based claims for on-the-record administrative review cause the complaints to fall short of a civil action. Ultimately, of course, the *Frances J.* analogy does not obscure the clear holding of the Seventh Circuit: The College's Complaints for Administrative Review are not civil actions and are therefore not removable under federal question jurisdiction. That sound holding should be upheld.

III. IF REMOVAL WAS PROPER, THE ABSTENTION DOCTRINE REQUIRES THE COURT TO REMAND THE CASE TO THE CIRCUIT COURT OF COOK COUNTY.

Even if the Court concludes that federal courts have subject matter jurisdiction over state court appeals from state administrative agency decisions, abstention principles require federal courts to refrain from deciding such cases out of deference to "obligations of comity, and respect for the appropriate balance between state and federal interests." *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1729 (1996) (Kennedy, J., concurring). Although the balance between state and federal interests "only rarely favors abstention," *id.* at 1727, the extraordinary circumstances of this case clearly warrant application of the doctrine.[12]

[12] There is no doubt that this Court can—and should—decide these abstention questions if it concludes that the district court had subject matter jurisdiction. The College has argued throughout this case that the district court should have "abstained" from exercising its jurisdiction. The College first raised abstention in its motion to remand its Complaint for Administrative Review. *See* Pet. App. at 95a n.1. The district court disposed of the College's arguments in a footnote, stating that whether removal was proper was distinct from whether abstention would be appropriate and that the court would "decline[] to address the merits of abstention at this early juncture." *Id.* The College again raised abstention-based issues before the Seventh Circuit, arguing that the district court should have refused under 28 U.S.C. § 1367(c) to exercise supplemental jurisdiction over the College's state law claims. Section 1367(c) codifies abstention principles. *See White v. County of Newberry*, 985 F.2d 168, 173 (4th Cir. 1993) (holding that a district applying section 1367(c) "is invoking the abstention doctrine and must address federalism concerns about avoiding federal overreaching into highly specialized state enforcement or remedial schemes"); David Siegel, *The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction*, 28 U.S.C.A. § 1367 Practice Commentary at 834-35 (West 1993). The Seventh Circuit did not reach the College's section 1367(c) arguments. Nevertheless, the City recognizes that this case implicates abstention principles. *See* Pet. Br. at 44. Finally, even if this Court were to find that the College had not fully raised its abstention arguments below, it could consider the issue *sua sponte*. *See Bellotti v. Baird*, 428 U.S. 132, 143-44 n.10 (1976) (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *England v. Medical Examiners*, 375 U.S. 411, 413 (1964); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500-01 (1941)).

The Court has long recognized several policy-based grounds for abstention, including:

> 1) to avoid unnecessarily deciding a federal constitutional question where the case may be disposed of by a state court interpretation of state law;
>
> 2) to leave to the state the resolution of unsettled questions of state law;
>
> 3) to show "regard for federal-state relations" or "wise judicial administration" and to avoid needless conflict with the administration by a state of its own affairs.

See id. at 1721, 1724; *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976); *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28 (1959). Each of these

well-settled grounds for abstention is manifest in the current case. Thus, even if the district court had subject matter jurisdiction, this case warrants remand[13] to the Circuit Court of Cook County under the doctrines announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).[14]

A. This Case Warrants *Burford* Abstention Because It Is Based On State Law Claims That Relate To A Complex State Regulatory Scheme And Implicate Local Policy Concerns Of Substantial Public Import.

The *Burford* abstention doctrine requires a federal court to abstain in cases involving "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'" or cases in which the exercise of federal review of the question in a case and in similar cases "'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Quackenbush*, 116 S. Ct. at 1726 (citations omitted). In *Burford*, the Court held that abstention was appropriate out of regard for the State of Texas' interest in controlling local oil drilling operations. *See Burford*, 319 U.S. at 334. In the current case, the City of Chicago's interest in

[13] The Court has held that a federal district court can remand a case to state court based on abstention principles. *See Quackenbush*, 116 S. Ct. at 1728 ("[F]ederal courts have the power to dismiss or remand cases based on abstention principles. . . .").

[14] Although this brief addresses the *Pullman* and *Burford* doctrines separately, it is important to note that "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987). Thus, in addition to being proper under either *Pullman* or *Burford*, abstention in this case may also be appropriate—out of respect for principles of comity and federalism—under a combination of abstention doctrines.

controlling local land use and historical preservation is equally compelling.

Abstention is favored where a regulatory scheme requires administrative review actions to be commenced in a specific court. In *Burford*, the decisions of the Texas Railroad Commission were reviewable in the state district court in Travis County. *See id.* at 325. The Court recognized that concentration of review in one state court is designed to avoid the confusion and inconsistency that might result from review by several courts. *See id.* at 327. As the Court explained, "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review." *Id.* In *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), the Commission's order was to be appealed to the Circuit Court of Montgomery County, as expressly called for by statute, but Southern Railway brought the case in federal court. 341 U.S. at 348. The Court required abstention because, in part, the concentration of appeals in a single court provided adequate state court review. *See id.* at 347-49. Here, the Landmarks Ordinance directs administrative review to the Circuit Court of Cook County. *See* J.A. 173, 175-76, Municipal Code §§ 2-12-810, 2-120-860. Concentration of judicial review under the Landmarks Ordinance, as in *Burford*, enables the Circuit Court of Cook County to acquire a specialized knowledge useful in applying the important local policy concerns implicit in the Ordinance. Further, as in *Alabama Public Service Commission*, concentration of appeals provides adequate state court review. Thus, federal court intervention in administrative review cases brought under the Ordinance will lead to the delay and confusion this Court has previously sought to avoid. Abstention is appropriate for this reason alone.

In sanctioning abstention in *Burford*, the Court recognized that the "non-legal complexities" involved in the Texas regulatory scheme weighed in favor of abstention. 319 U.S. at 323. The Court also noted that balancing the public interest in resource conservation and the private interests in property rights added complexity to the case. *See id.* at 323-24 n. 16. Similarly, in

Alabama Public Service Commission, the Court ordered abstention where the federal court was asked to balance individual interests against predominantly local public interests. 341 U.S. at 347-48.

In the case at bar, application of the Landmarks Ordinance requires consideration of numerous individual interests, such as the economic impact of a landmark designation on a property owner. *See* J.A. 174, Municipal Code § 2-120-830. Against these individual interests, local policy considerations must be weighed, including the purported architectural uniqueness, historical significance, and the "distinctive physical appearance or presence representing an established and familiar visual feature of a neighborhood, community, or the city of Chicago." J.A. 163, Municipal Code § 2-120-620. Further, the Landmarks Ordinance sets forth criteria to be applied by the Commission, defines the Commission's power to make an initial "preliminary designation" of a property as a landmark, provides for the enactment of a confirming "Designation Ordinance" by the City Council, permits public hearings before the Commission, and provides that all final decisions of the Commission shall be judicially reviewed in the Circuit Court of Cook County. *See* J.A. 160-176, Municipal Code §§ 2-120-610 *et seq.* The Ordinance thus clearly demonstrates the Chicago City Council's effort to establish a coherent policy regarding a matter of substantial public concern—preservation and development of Chicago's historical and architectural landmarks and districts.

The issues in this litigation are further complicated by the fact that the Landmarks Ordinance is only part of the City's land regulation scheme. In addition to the proceedings before the Landmarks Commission involving the College's demolition permit application and economic hardship application, the College also was required to apply for a permit under the Lakefront Protection Ordinance. *See* Pet. App. at 4a. Together these ordinances, along with the applicable provisions of the Chicago Zoning Ordinance, constitute a complex scheme designed to regulate land use, a matter of uniquely local concern.

The Court has emphasized that federal adjudication of "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors . . . would . . . disrupt the State's attempt to ensure uniformity in the treatment of an 'essentially local problem.'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989) ("*NOPSI*") (quoting *Alabama Pub. Serv. Comm'n*, 341 U.S. at 347). The current case directly presents these types of claims. The College alleged that the Landmarks Commission went beyond the purview of its statutory authority, that the Commission did not properly weigh the relevant factors set out in the Ordinance, and that the Commission's actions did not conform to the letter of state law. *See* Pet. App. at 46a-89a. To decide these questions would disrupt the Chicago City Council's attempt to regulate uniformly the uniquely local problems associated with development and preservation of Chicago's real estate.

Finally, when the issues in a case are predominantly local in nature, abstention is appropriate. *See Thibodaux*, 360 U.S. at 28; *Alabama Pub. Serv. Comm'n*, 341 U.S. at 347-48. The Court has expressed the view that matters of land use planning are primarily of local concern. *See Thibodaux*, 360 U.S. at 28 (stating that eminent domain concerns "turn on legislation with much local variation interpreted in local settings"). Indeed, lower federal courts have held that the uniquely localized nature of land use cases requires abstention. *See, e.g., Pomponio v. Fauquier County Bd.*, 21 F.3d 1319, 1326-27 (4th Cir. 1994), *cert. denied*, 513 U.S. 870 (1994); *Fields v. Rockdale County*, 785 F.2d 1558, 1561 (11th Cir.) ("The 'routine application of zoning regulations . . . is distinctly a feature of local government.'") (quoting *Hill v. City of El Paso*, 437 F.2d 352, 357 (5th Cir. 1971)), *cert. denied*, 479 U.S. 984 (1986); *Meredith v. Talbot County*, 828 F.2d 228, 232 (4th Cir. 1987) (ordering abstention because zoning was an important matter of state and local policy, the county's land use policies were governed by a complex regulatory scheme, and state court remedies were available); *Ad-Soil Servs., Inc. v. Board of County Comm'rs*, 596 F. Supp. 1139, 1143 (D. Md.

1984) (holding that *Burford* abstention applied because the matter was "clearly a local land use case"). In the land use case at bar, abstention is clearly appropriate.

Indeed, the local nature of the interests involved here contrasts sharply with the interests presented in *NOPSI*, where the Court held that abstention was not proper. In *NOPSI*, the Court reasoned that because wholesale electricity is not purchased and sold within a predominantly local market, a federal court did not need to be familiar with distinctively local regulatory facts or policies, and its intervention would not disrupt those policies. 491 U.S. at 363-64.[15] In the current case, the Landmarks Ordinance requires due consideration of uniquely local factors: Chicago's distinct architectural history, Chicago's interest in preserving that history, and the College's interests in developing its properties to enable it to further its beneficent goals. Because this case, unlike *NOPSI*, is so intertwined with local interests and local policies, abstention is required.

B. This Case Warrants *Pullman* Abstention Because It Presents Unsettled Questions Of State Law The Resolution Of Which Likely Will Eliminate The Federal Constitutional Questions.

The *Pullman* abstention doctrine recognizes that federal courts may be required to abstain in certain cases "'to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)); *see also Pullman*, 312 U.S. at 500-01. The Court has explained that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

[15] In *NOPSI*, the Court did not order abstention because state law claims were not involved. *See* 491 U.S. at 361.

In *Pullman*, the Court ordered abstention where the state-law question had not yet been addressed by the Texas Supreme Court and, therefore, the federal district court's interpretation would merely provide a "forecast rather than a determination" of the state-law issue. 312 U.S. at 499. The Court explained that state court interpretation of the state-law questions involved in that case could end the litigation and obviate the need for deciding the constitutional questions presented by the plaintiff. *See id.* at 501.

Pullman abstention is especially appropriate where, as here, the interrelationship between the challenged state law or local ordinance and the state constitution is unclear. *See Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975). In *Harris*, the Court explained that abstention is favored where "the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute." 420 U.S. at 84. Similarly, in *Reetz v. Bozanich*, 397 U.S. 82 (1970), the Court ordered abstention because resolution of state constitutional issues by an appropriate state court "could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." *Id.* at 86-87. Likewise, in *Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639 (1959) (per curiam), the Court ordered abstention where the plaintiff raised state and federal constitutional challenges to a state public utilities statute, explaining that "when the state court's interpretation of the statute *or evaluation of its validity under the state constitution* may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." *Id.* at 640-41 (emphasis added).

Finally, in *Spector Motor Service*, the Court ordered abstention pending determination of state constitutional questions, explaining that the federal court was "without power" to decide state constitutional questions and that the federal court's "speculative" interpretations could be obviated or altered by state court resolution of the issues presented. 323 U.S. at 104-05; *see*

also Askew v. Hargrave, 401 U.S. 476, 477-78 (1971) (per curiam) (remanding for consideration of whether district court should have abstained pending resolution of state constitutional challenges to the statute in issue). These cases vividly demonstrate the propriety of abstention where resolution of state constitutional questions might obviate the need to address federal constitutional issues.

Applying this well-established precedent to the current case, it is clear that abstention is required. The College's first Complaint for Administrative Review alleged numerous violations of the Illinois Constitution. *See* J.A. 22-26, 33, Complaint ¶¶ 16(a)-(e), (g), (n). For example, the College challenged the Landmarks Ordinance on the basis that, in violation of the Illinois Constitution, it delegated legislative power to the Commission to designate landmark districts and to approve permits for construction or demolition of landmarked structures without providing legally sufficient criteria. *See* J.A. 23, Complaint ¶¶ 16(b), (c). Illinois courts have not resolved this or the other difficult Illinois constitutional issues raised by the College.

While this Court has indicated that federal courts need not abstain solely on the basis of unsettled state constitutional questions where the state constitutional provisions closely parallel provisions of the federal constitution, *see Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 n.4 (1984); *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 598 (1975), the Court has "regularly" required abstention where the "challenged statute is part of an integrated scheme of related constitutional provisions, statutes and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts." *Harris*, 420 U.S. at 84 n.8. In this case, the College challenges the Landmarks Ordinance under Illinois constitutional provisions that effectively have no counterpart in federal constitutional law. *See, e.g.*, J.A. 23, Complaint ¶¶ 16(b), (c) (challenging the Landmarks Ordinance on the basis that it unconstitutionally delegates power without providing legally sufficient criteria for exercise of that power); J.A. 24, Complaint ¶ 16(e) (alleging violations of the

Illinois Constitution's takings clause). The Illinois takings clause and the nondelegation doctrine under the Illinois Constitution provide more protection than analogous provisions of the United States Constitution. *See Equity Assoc. v. Village of Northbrook*, 524 N.E.2d 1119, 1126 (Ill. App. Ct.) ("The guarantees of the Illinois Constitution that 'private property shall not be taken or damaged for public use without just compensation' is greater than the parallel guarantee provided under the . . . United States Constitution."), *appeal denied*, 530 N.E.2d 243 (Ill. 1988); *see also Dolan v. City of Tigard*, 512 U.S. 374, 389-90 (1994) (describing the "exacting scrutiny" required under the Illinois Constitution's takings clause, as opposed to its federal counterpart); *compare Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (finding no violation of federal nondelegation doctrine) *with City of Chicago v. Pennsylvania R.R. Co.*, 242 N.E.2d 152, 157 (Ill. 1968) (finding violation of Illinois nondelegation doctrine).

If this case is not remanded to the Circuit Court of Cook County, the Seventh Circuit will have to interpret the Landmarks Ordinance in light of the more protective constitutional standards of the Illinois Constitution. Indeed, the court will have to apply the Landmarks Ordinance and the Illinois Constitution's takings and nondelegation provisions, which together constitute an "integrated scheme" that "as a whole calls for clarifying interpretation in the state courts." *Harris*, 420 U.S. at 84 n.8.

Additionally, there is no doubt that resolution of the Illinois constitutional issues in the College's favor would obviate the need to decide federal constitutional questions. If the Circuit Court of Cook County were to hold that the Landmarks Ordinance violates the Illinois Constitution on its face[16] or as applied,[17] then "there [would be] an end of the litigation; the [federal] constitutional issue [would] not arise." *Pullman*, 312 U.S. at 501. Thus, *Pullman* abstention is required.

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[16] *See* J.A. 22-24, Complaint ¶¶ 16(a)-(d).

[17] *See* J.A. 24-26, 34, Complaint ¶¶ 16(e), (g), (r).

In addition to recognizing that cases presenting unsettled state constitutional questions are particularly appropriate for abstention, the Court has held repeatedly that the fact that a state statutory provision has not been construed by the state courts is a factor favoring abstention. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 511 (1972); *Albertson v. Millard*, 345 U.S. 242, 244-45 (1953); *Shipman v. DuPre*, 339 U.S. 321, 322 (1950); *Spector Motor Serv., 323 U.S.* at *104*.[18] In *Albertson*, the Court explained that "[i]nterpretation of state legislation is primarily the function of state authorities, judicial and administrative." 345 U.S. at 244.

The Landmarks Ordinance provisions at issue in the current case have never been authoritatively construed by Illinois courts. As in *Albertson*, interpretation of the difficult questions of state law raised by the College should be primarily the function of Illinois authorities. Thus, Illinois courts—not federal courts—should have the first word in interpreting and applying the Landmarks Ordinance. Without an authoritative interpretation by Illinois courts, the federal district court's decision can be nothing more than a "forecast" of state law. *See Pullman*, 312 U.S. at 499.

Finally, an initial state court interpretation of the Landmarks Ordinance in this case could substantially alter or render moot the federal constitutional questions. As three

[18] Of course, this factor is not in itself controlling where an unambiguous statute has been "regularly applied" by state trial courts over the course of several decades. *See City of Houston v. Hill*, 482 U.S. 451, 469-70 (1987) (refusing to require abstention where statute was unambiguous, had been in force for over 30 years, and had been interpreted numerous times by municipal courts, but not by state appellate courts). That is not the case here. The challenged provisions of the Landmarks Ordinance, which are far from unambiguous, have not been "regularly applied" by the Illinois courts. One clear example is that no Illinois decision addresses the College's first challenge to the Landmarks Ordinance: that section 2-120-630 unconstitutionally authorizes the Commission to designate private property as a landmark without prior notice or an opportunity to object. *See* J.A. 22-23, Complaint ¶ 16(a).

members of the Court stated in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985): "Where a state statute has never been construed or applied, it seems rather obvious that interpretations of the statute by a state court could substantially alter the resolution of any claim that the statute is facially invalid under the Federal Constitution." *Id.* at 509 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring).

If this Court reverses the Seventh Circuit and decides that removal of the College's Complaints for Administrative Review was proper, the Court should hold that abstention is required in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit Court of Appeals remanding this case to the Circuit Court of Cook County should be affirmed.

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No. 96-910

(10)

IN THE
Supreme Court of the United States
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Petitioners,
v.
INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONERS

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---

REPLY BRIEF FOR PETITIONERS *

Respondents' brief notably fails to dispute the two most critical elements of the jurisdictional inquiry in this case: (1) that ICS elected to allege in its state-court complaints that the Landmarks Commission's decisions violated its federal constitutional rights, and (2) that longstanding principles of federal jurisdiction (now codified in the supplemental jurisdiction statute) provide that a federal court with such a federal question before it may also hear state-law claims even when they would not otherwise fall within federal jurisdiction. These basic principles are dispositive here, for they establish that ICS has filed complaints that contain federal claims falling within the district court's original jurisdiction and state-law claims falling within its supplemental jurisdiction.

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* Peter C.B. Bynoe, identified as a petitioner in our opening brief, no longer sits as a member of the Commission on Chicago Historical and Architectural Landmarks.

I. A COMPLAINT CONTAINING FEDERAL LAW CLAIMS AND STATE-LAW, ON-THE-RECORD REVIEW CLAIMS IS A CIVIL ACTION WITHIN FEDERAL JURISDICTION.

Respondents do not begin their analysis where one would expect—with the text of the jurisdictional statutes at issue. Rather, respondents contend that "in deciding whether a complaint for administrative review is removable, a court must focus on the nature of the state judicial action and the standard of review to be applied by state courts." Resp. Br. 5. This assertion is not based on any language actually found in a jurisdictional statute but on what respondents say is the "great weight of authority." *Ibid.* That weight of authority turns out to be a single sentence taken out of context from *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), a similar sentence from *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961), and decisions from the First and Fourth Circuits. The text of the pertinent jurisdictional statutes, however, is to the contrary.

As we explain in our opening brief, federal jurisdiction over state-law claims that are joined with federal questions is governed by the supplemental jurisdiction statute, 28 U.S.C. § 1367(a). That provision does not require that a state-law claim be an "original" action or one involving "de novo" review; it instead grants "supplemental jurisdiction over all other claims that are so related to claims in the action that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Respondents do not doubt that their state administrative review claims constituted "claims" sufficiently related to their federal constitutional claims to be part of the same case or controversy. Yet that is all that is necessary for these claims to fall within the federal courts' congressionally granted supplemental jurisdiction.

As for the "weight of authority" itself, on the first factor respondents propose—the nature of the state action—the precedents help respondents not at all. We

readily agree that proceedings before an administrative agency are not removable (see Pet. Br. 31, 34-35), but *Stude* itself, on which respondents otherwise heavily rely, explains that when a party aggrieved by an administrative decision takes "a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court." 346 U.S. at 578-79. And in *Horton*, the Court squarely held that such an action may be heard by a federal district court. See 367 U.S. at 354-55. Thus, this Court has already determined that actions seeking judicial review of an administrative decision are within the jurisdictional competence of the district courts; indeed, respondents' brief does not appear to argue to the contrary.

As for respondents' second factor—the "scope of review" to be applied—*Stude* and *Horton* establish, as respondents concede, that "administrative review cases that seek trials *de novo* in the state . . . court are removable." Resp. Br. 4. Nothing in the Court's decisions in those cases suggests, however, that such de novo review is required for removal. The Court in *Stude* did not even mention the scope of review of the administrative valuation proceeding in assessing jurisdiction, and the Court in *Horton* did so only in passing. The language in *Stude* that respondents latch onto—that a district court "does not sit to review on appeal action taken administratively or judicially in a state proceeding" (346 U.S. at 581)—is not about the scope of review to be exercised by a federal court, since the state-law action at issue there was for de novo review of an administrative body's decision, as respondents acknowledge. See Resp. Br. 6. Thus it was not deferential or on-the-record review that created the jurisdictional problem in *Stude*. Rather, as we explain in our opening brief, there was no right of removal in *Stude* because the railroad had attempted to contest the administrative calculation of a condemnation award while leaving the other aspects of the eminent domain proceeding to be decided elsewhere—a choice that produced what was an

"appellate" proceeding not within the district court's jurisdiction because the railroad was attempting to obtain review of only a single administrative finding and not the judgment. See Pet. Br. 31-32; see also 346 U.S. at 581-82. In *Horton*, by contrast, the lawsuit did not have an interlocutory character because the insurance company had filed suit seeking to set aside the administrative decision, not merely one of the findings, and " 'a suit to set aside an award of the board is in fact a suit, not an appeal.' " 367 U.S. at 354 (quoting *Booth v. Texas Employers' Insurance Association*, 132 Tex. 237, 246, 123 S.W.2d 322, 328 (1938)). That was why the Court rejected Horton's reliance on *Stude*, explaining that the insurance company's suit "is not an appellate proceeding." 367 U.S. at 355.

It is true that the First and Fourth Circuits have embraced respondents' reading of *Stude* in the two 1995 decisions on which respondents rely, although they did so in the context of diversity jurisdiction without considering whether such a limitation on jurisdiction can be reconciled with the supplemental jurisdiction statute, and in the face of a contrary Eighth Circuit decision that had been treated as settled law for nearly four decades.[1] And that is the

[1] The decisions that support respondents' reading of *Stude* are *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), and *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995). As we explain in our opening brief, these decisions are in conflict with *Range Oil Supply Co. v. Chicago, R.I. & P.R. Co.*, 248 F.2d 477 (8th Cir. 1957). See Pet. Br. 38-39. The other cases respondents cite, however, involve quite different jurisdictional problems than the one respondents claim exists here. *Labiche v. Louisiana Patients' Compensation Fund Oversight Board*, 69 F.3d 21 (5th Cir. 1995) (per curiam), did not involve removal; there, the plaintiff filed his claim in federal court attacking an agency's decision but did not raise any claim arising under federal law and for that reason there was no federal jurisdiction. See *id.* at 22. In *FSK Drug Corp. v. Perales*, 960 F.2d 6 (2d Cir. 1992), the plaintiff raised federal claims seeking review of a state agency decision (see *id.* at 9-11), but the court found that the federal civil rights claims were not "an appropriate vehicle" to decide whether a state agency's decision was "arbitrary and capricious." *Id.* at 11. In *Frison v. Franklin County Board of Education*, 596 F.2d 1192 (4th Cir. 1979), the court considered and rejected plaintiff's constitutional challenges to the administrative proceedings that caused her demotion, and then declined to hear her remaining state-law claim as pendent to her federal claim. See *id.* at 1193-94. *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978), held that state administrative decisions cannot be reviewed under the Administrative Procedure Act. See *id.* at 414. *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972), held that a labor board adjudicating questions between parties of unfair labor practices is a "court" from which proceedings are removable. See *id.* at 41, 43-45. In *Trapp v. Goetz*, 373 F.2d 380 (10th Cir. 1968), the court held that the district court lacked jurisdiction over a federal action for pension benefits because the city pension board was still deciding the claim. See *id.* at 382-83. In his dissent in *Fairfax County*, Judge Widener distinguished most of these cases on these very grounds. See 64 F.3d at 162 n.4.

extent of the "great weight of authority" supporting respondents' reading of *Stude*.

In the end, debate about isolated sentences in *Stude* and *Horton* is not necessary here, since this Court has spoken directly to the question whether an action involving something other than de novo review is a "civil action" within "original jurisdiction." As we explain in our opening brief (see Pet. Br. 11, 29-30, 39, 48), in *Califano v. Sanders*, 430 U.S. 99 (1977), this Court held that district courts proceeding under their federal-question jurisdiction may conduct on-the-record review of administrative decisions in actions under the Administrative Procedure Act. 5 U.S.C. §§ 701-706 ("APA"). See 430 U.S. at 107. Thus respondents' position that an action involving deferential or on-the-record review is not a "civil action" within a district court's "original jurisdiction" cannot be squared with the established fact that an action seeking judicial review of a federal agency's decision under the APA is a "civil action" within the "original jurisdiction" of the federal district courts within the meaning of the federal-question statute, 28 U.S.C. § 1331. APA actions, of course, involve deferential review based on the record before the agency and for that reason they constitute precisely the type of "appellate proceedings" that respondents

claim district courts may not hear.[2] Our point, of course, is not that the APA is applicable to state administrative agencies, a position respondents seem to attribute to us. See Resp. Br. 12. Our point is rather that this Court has already determined that Congress included within the grant of "original jurisdiction" federal-question cases requiring federal courts to conduct on-the-record, deferential review. And, of course, the terms of the removal statute, 28 U.S.C. § 1441, track the terms of the federal-question statute.

Respondents cannot explain why, if the district court's jurisdiction extends to federal administrative claims that are reviewed deferentially, it does not extend to state administrative claims that are reviewed deferentially. Certainly there is nothing in the language of Section 1331 to suggest that a "civil action" within "original jurisdiction" means one thing when the decision of a federal agency is to be reviewed and something else when the decision of a state agency is attacked. Nor do the terms of the statute suggest that the phrase "civil action" within "original jurisdiction" could mean one thing in Section 1331 and something else in Section 1441.

Bereft of any textual support in the statute, respondents attempt to distinguish state and federal administrative review based on "notions of comity and federalism." Resp. Br. 12. But as we explain in our opening brief, whatever federalism concerns exist when federal courts are called upon to decide questions of state law have never been thought to give rise to a limitation on the explicit statutory authority of the federal courts to hear such claims. See Pet. Br. 43-46. Moreover, respondents do not explain why federal judicial review of state administrative decisions implicates such concerns. As we also set forth

[2] See *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) ("focal point for judicial review should be the administrative record already in existence"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-16, 419 (1971) (administrative review is based on record compiled by agency).

in our opening brief, if a de novo proceeding attacking an agency's decision does not offend federalism—and the Court in *Horton* plainly did not think that it did—on-the-record review certainly does not intrude. It is, if anything, more protective of state and local interests because it provides deference to state decisionmaking that de novo review does not. See Pet. Br. 47.[3]

We explain in our opening brief that the concept of a "civil action" within "original jurisdiction" has historically been understood to be comprehensive, reaching every type of action of a civil character that is of a judicial nature. See Pet. Br. 33-38. Under *Califano v. Sanders*, that includes a case seeking on-the-record review of an administrative decision. Respondents thus are reduced to relying on a statement from a reversed district court case, which suggests that such sociological, legal, and political developments as "the rise of populism, the demise of economic due process, and ultimately the advent of the New Deal" mean that the historical and longstanding definition of civil action might no longer be satisfactory. See Resp. Br. 7. But the jurisdictional inquiry cannot be divorced from historical understandings as ICS urges. In *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), for example, the Court based its holding on its "unwilling[ness] to cast aside an understood rule that has been recognized for nearly a century and a half" (*id.* at 694-95) and relied on precisely the same kind of "19th-Century Court precedent" (Resp.

[3] Respondents warn that our position will mean that "every landmarks commission decision and zoning board decision soon will find its way into federal court." Resp. Br. 13 n.5. But supplemental jurisdiction over state-law claims exists only when a plaintiff has also included in a complaint already pending in the district court a substantial federal claim falling within either federal-question or diversity jurisdiction. The alternative, in any event, is more unattractive. Under respondents' view and that of the court below, a plaintiff that wishes a federal forum for its federal claims must file two actions, since state-law administrative review claims can be heard only in state court.

Br. 7) that respondents here assail.[4] That is scarcely surprising; one would think, as the Court apparently did in *Ankenbrandt*, that the doctrine of *stare decisis* would be especially powerful in the area of longstanding statutory grants of jurisdiction where certainty and predictability are especially important.

More important, respondents do not defend the court of appeals' holding that because the district court lacked jurisdiction to hear administrative law claims under state law, its judgment—including its rejection of respondents' federal constitutional claims involving de novo review—should have been vacated in its totality and all of respondents' claims remanded to state court. As we explain in our opening brief, even when a federal court is jurisdictionally barred from hearing some claims before it, that does not affect its jurisdiction over others. See Pet. Br. 40-42. The supplemental jurisdiction statute, for example, only authorizes federal courts to decline jurisdiction over "all matters in which State law predominates . . . ." 28 U.S.C. § 1367(c). There is simply no reason—and respondents advance none—why the presence of some jurisdictionally defective claims in a complaint could somehow infect the others with a type of jurisdictional contagion that requires that the entire case be sent to state court.[5]

[4] Respondents dismiss a wealth of historical precedent with the comment that "these early decisions are of dubious value . . . because they do not address the standard of review to be applied in the state appeal." Resp. Br. 8. That is precisely our point—the scope of review to be applied has never been thought significant in ascertaining jurisdiction. Respondents thus advocate ignoring an entire body of jurisdictional law because it does not meet the test that they now believe—despite an absence of textual or historical support—is of primary importance.

[5] The only precedent cited by respondents or the court of appeals in support of the approach taken below is *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), cert. denied, 513 U.S. 876 (1994). *Frances J.* was the subject of considerable criticism in both our opening brief and the two amicus curiae briefs supporting petitioners. In response respondents write simply that they have "no need to defend the holding of *Frances J.*" Resp. Br. 27. On that basis, respondents should offer some other precedent to support the judgment below, but they do not.

II. ICS'S FEDERAL CONSTITUTIONAL CLAIMS ARISE UNDER FEDERAL LAW.

Since at least *Gully v. First National Bank*, 299 U.S. 109 (1936), it has been settled that a claim "arises under" federal law for purposes of federal-question jurisdiction when "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Id.* at 112. Even respondents accept this settled formulation. See Resp. Br. 17. ICS's state-court complaints plainly satisfy this test; as we explain in our opening brief, the complaints allege that ICS had a constitutional entitlement to demolish the buildings on its landmarked property (see Pet. Br. 17-20), and in their brief respondents do not quarrel with that characterization.

Instead, respondents advance an argument that the court of appeals did not embrace—that their state-court complaints did not fall within federal-question jurisdiction because they purported to rely on the right of judicial review contained in the Illinois Administrative Review Law, rather than a federally created right to attack governmental action such as the cause of action for deprivation of federal rights set out in 42 U.S.C. § 1983. See Resp. Br. 21-24.[6] Apparently seeking to have the Court repudiate the *Gully* test, respondents urge reliance on Justice Holmes's statement in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), that "[a] suit arises under the law that creates the cause of action." *Id.* at 260. See Resp. Br. 17. This rule of thumb, however, "has been rejected as an exclusionary principle." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S.

[6] Although respondents assert that the court of appeals found that there were no identifiable federal claims in the state-court complaints (Resp. Br. 2-3, 20), in fact the court of appeals acknowledged that the "complaints contain several challenges to the Chicago Landmark Ordinance arising under the federal constitution . . . ." Pet. App. 22a n.14. See also *id.* at 20a.

1, 9 (1983). Moreover, respondents never explain why their complaints fail to satisfy the rule that they urge. Respondents of course do not suggest that the Illinois Administrative Review Law created the right to relief from an administrative decision that unconstitutionally denies a landowner the right to demolish a building it owns; the constitutional claims in ICS's state-court complaints rest on rights and immunities created by federal and not state law. That the complaints also assert rights and seek remedies created by state law should not obscure the fact that the federal claims arise under federal law.

Respondents also rely on *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), in which the Court held that a tort action did not fall within federal-question jurisdiction even though the plaintiffs alleged that Merrell Dow had injured them by mislabelling a drug in violation of a federal statute. See *id.* at 805, 817. In that case, the plaintiffs had no rights created under federal law; the parties agreed that the federal statute at issue contained no private right of action. See *id.* at 810-11. As a result, the Court concluded that "it would flout congressional intent to provide a private federal remedy for the violation of the federal statute." *Id.* at 812 (footnote omitted). Here, there is no doubt that federal law grants landowners like ICS a right to relief; even respondents acknowledge that they could have filed suit in federal court on the basis of these same constitutional allegations. See Resp. Br. 22-24. This accordingly is not a case like *Merrell Dow* in which the defendant removed a complaint on the strength of federal-question jurisdiction even though federal law granted the plaintiffs no rights at all. See also *Moore v. Chesapeake & O.R. Co.*, 291 U.S. 205, 216-17 (1934) (state tort action alleging violation of federal statutory standard not within federal jurisdiction since under the statute "the right of the plaintiff to recover was left to be determined by the law of the State").

It is true that the state-court complaints purport to assert only a state-created right of judicial review rather

than a federal right of action; but the substance rather than the form of a complaint is determinative for jurisdictional purposes. That is certainly true for a complaint filed in federal court. A complaint that fails to identify the proper basis for jurisdiction is not dismissed; such pleading defects are ignored as long as a basis for federal jurisdiction in fact exists. See *Schlesinger v. Councilman*, 420 U.S. 738, 744 n.9 (1975). See also, *e.g.*, *Albert v. Carovano*, 851 F.2d 561, 571 n.3 (2d Cir. 1988); *Hildebrand v. Honeywell, Inc.*, 622 F.2d 179, 180 (5th Cir. 1980); *Rohler v. TRW, Inc.*, 576 F.2d 1260, 1264 (7th Cir. 1978). The plaintiff's failure to identify the basis for federal jurisdiction in a state-court complaint should be no more significant, since under the plain terms of the removal statute, "state court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

Respondents' position that they can control removal merely by electing to cite a state statute rather than Section 1331 as the jurisdictional basis for their complaints is simply an argument that federal jurisdiction can be defeated by artful pleading; yet as we explain in our opening brief (Pet. Br. 20), and as respondents acknowledge (Resp. Br. 25-26), such tactics cannot defeat removal. While respondents claim that they have done nothing that can be taken as "artful pleading," we think they are too modest. Under respondents' theory, as long as a plaintiff can find a state-law procedural vehicle for bringing suit that permits it to raise federal as well as state claims in a complaint, it can defeat the statutory right of removal that Congress has granted to those who must defend claims of right arising under federal law. Yet, it is long settled that a state law—even one purporting to require that claims brought under it must be litigated in state court—cannot abridge the jurisdiction of the federal courts. See Pet. Br. 23 n.14 (discussing *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 253 (1905); *Barrow v. Hunton*, 99 U.S. 80, 85 (1879)).

Even apart from these limitations on a pleader's ability to defeat removal, the *Gully* test also means that even when a plaintiff advances a state-law theory that depends on the existence of a federal right or immunity, the case falls within federal-question jurisdiction. This Court has repeatedly held that federal-question jurisdiction reaches "'those cases in which a well-pleaded complaint establishes *either* that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 808 (1988) (quoting *Franchise Tax Board*, 463 U.S. at 27-28 (emphasis added)). For example, in both *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and *Hopkins v. Walker*, 244 U.S. 486 (1917), federal-question jurisdiction was sustained over suits in which the plaintiffs asserted state-law rights that turned on federal law—in *Smith*, a shareholder asserted a state-law right to prevent a bank from purchasing federally issued securities on the ground that the federal statute authorizing their issuance was unconstitutional (see 255 U.S. at 201-02), and in *Hopkins* the plaintiffs sued to remove a cloud on their mining claim by alleging that the adverse claimants had no valid claim under applicable federal law (see 244 U.S. at 489, 491).

Here, as we explain in our opening brief, although respondents elected a state procedural vehicle to bring their federal claims, their right to relief on their federal claims depends on nothing but federal law. See Pet. Br. 18-20. Nothing more—in particular, no proof of any violation of a state-created right—is necessary. Yet without so much as discussing *Smith* or *Hopkins*, respondents ask for a radical departure from settled jurisprudence that would enable plaintiffs to defeat removal whenever a state has created a cause of action that also permits them to raise federal claims.

Respondents also claim that their federal claims do not stand alone but instead "are inextricably intertwined with

matters grounded in state law and limited to the administrative record . . . ." Resp. Br. 20. And they correctly observe that the plaintiff may "avoid removal by tailoring his or her complaint to exclude" removable claims. *Id.* at 23. But respondents did not choose this course; their complaints are chock full of allegations of the denial of federal constitutional rights. Had these claims been superfluous, we assume that respondents would not have brought them.[7] And if they truly added nothing, it was entirely within respondents' power, prior to the adverse judgment on the merits by the district court, to avoid federal jurisdiction by voluntarily dismissing those claims. But respondents did the opposite—they filed an amended complaint repeating those claims and expressly invoked federal-question jurisdiction. J.A. 143. It was respondents' own decision to allege numerous federal constitutional violations in addition to their state-law claims. And it is these federal claims that make this a "civil action" within the "original jurisdiction" of the district court.

III. ABSTENTION PRINCIPLES DO NOT PROVIDE A BASIS TO AFFIRM THE JUDGMENT BELOW.

Respondents devote a substantial portion of their brief not to defending the holding of the court of appeals but to the contention that a remand of this case to state court is proper on grounds of abstention. See Resp. Br. 28-39. Their attempt to inject abstention into the case at this juncture should be rebuffed on both procedural and substantive grounds.

Neither the district court nor the court of appeals considered whether it should abstain from hearing any of

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[7] To the extent that respondents suggest that even their federal claims must be decided on the administrative record under Illinois law, they are mistaken. As we explained in our opening brief, and as the court of appeals acknowledged, in *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 428-30, 551 N.E.2d 640, 646 (1990), the Illinois Supreme Court determined that when an administrative decision is attacked on constitutional grounds the plaintiff may adduce evidence outside of the administrative record. See Pet. Br. 18-19, 38 n.22; Pet. App. 18a-20a.

respondents' claims, and with good reason. Respondents sought a remand to state court on abstention grounds in only the first of the two complaints removed to the district court, and the district court declined to address the merits of abstention at that early stage where it was unclear what legal theories respondents would pursue. See Pet. App. 95a n.1. Respondents never renewed their abstention argument in the district court, and even when seeking remand on appeal they never invoked abstention principles. Thus the record is far from complete on whether respondents' state-law theories require abstention.

As a matter of substance, the state-law issues that respondents seek to litigate do not warrant abstention under either *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), or *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Pullman* abstention operates only in "cases in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1721 (1996). As the Court explained in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), " 'abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction.' " *Id.* at 237 (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 & n.14 (1967)). And in each of the cases on which respondents rely, state or local law was unsettled. See, *e.g.*, *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 84 (1975) ("the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute"); *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 511 (1972) ("terms [of Michigan pollution law] are far from clear"); *Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 640 (1959) (per curiam) ("resolution of [state law problems] is not without substantial difficulty"); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (requiring "preliminary guesses regarding local law"). Here, however, the state law governing this case is too well established, and its contours too far removed from any limiting construction, to avoid determination of the federal constitutional issues urged by respondents.

Respondents identify only three of their claims that, in their view, raise questions of state law warranting abstention: (1) the Landmarks Ordinance violates the Illinois Constitution by delegating legislative power to the Landmarks Commission without "legally sufficient criteria" (Resp. Br. 36); (2) the Landmarks Ordinance effects an unlawful taking under the Illinois Constitution (see *id.* at 36-37); and (3) the Landmarks Ordinance unconstitutionally authorizes a preliminary designation of a property as a landmark without prior notice or opportunity to object (see *id.* at 38 n.18). These state-law issues, however, are ones that can be decided by reference to settled Illinois law—as, indeed, they were by the district court here.

To take the third issue first, while the district court found that this issue posed no special difficulties, J.A. 137-38, the merits are not even properly at issue here. For one thing, ICS filed suit long after the applicable statute of limitations had expired for actions challenging the preliminary designation of the property.[8] For another, respondents did not contest the district court's ruling on this issue in the court of appeals, thereby obviating whatever abstention concerns the court of appeals might have had if it had been called upon to review that ruling.

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[8] The Illinois Local Governmental and Governmental Employees Tort Immunity Act sets a one-year statute of limitations for actions against local governments seeking to recover for an "injury" (745 ILCS para. 10/8-101), and defines "injury" to include constitutional claims (*id.* para. 10/1-204). The preliminary designation of ICS's property as a landmark occurred nearly three years before the suit challenging that designation was filed. And because the permanent landmark designation also was made before respondents filed suit, any claim for injunctive relief—generally outside the Tort Immunity Act—was moot.

The remaining two issues require only the application of clear Illinois law. The unlawful delegation claim is governed by the test announced in *Stofer v. Motor Vehicle Casualty Co.*, 68 Ill. 2d 361, 369 N.E.2d 875 (1977), which requires only "sufficient identification" of "(1) the *persons* and *activities* potentially subject to regulation; (2) the *harm* sought to be prevented; and (3) the general *means* intended to be available to the administrator to prevent the identified harm." *Id.* at 372, 369 N.E.2d at 879 (emphasis in original). As the district court recognized (Pet. App. 46a-54a), under *Stofer* an unlawful delegation attack on a land use ordinance is easily adjudicated using this established test. See, *e.g.*, *People ex rel. City of Canton v. Crouch*, 79 Ill. 2d 356, 361, 372-74, 403 N.E.2d 242, 244, 249-59 (1980) (per curiam) (rejecting unlawful delegation challenge to Redevelopment Act, which allows municipalities to "demolish, remove, renovate, [or] rehabilitate" properties).

As for the takings challenge, respondents are correct that the Illinois Constitution provides broader protection than the federal Takings Clause, since it protects private property from being "taken or damaged" (ILL. CONST. art. I, § 15).[9] The protection against takings, however, is both settled and familiar to federal courts. As the district court recognized (Pet. App. 59a-60a), the test under Illinois law for when governmental action involving no physical invasion of property amounts to a taking is the same as this Court has employed for federal constitutional purposes—whether "governmental regulation radically curtails a property owner's rights such that 'all economically beneficial or productive use of land' is denied." *Forest Preserve District v. West Suburban Bank*, 161 Ill. 2d 448,

[9] Respondents also point to the discussion of Illinois law in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (see Resp. Br. 37), but that involves the test applicable to "exactions"—cases in which a local government requires a property owner to surrender control over part of its property for a public purpose in order to obtain some corresponding benefit. See 512 U.S. at 388-90. ICS alleged no such action in this case.

457, 641 N.E.2d 493, 497 (1994) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)). As for damaging property, in *Rigney v. City of Chicago*, 102 Ill. 64 (1881), the court decided that this extra protection applies only when there is "some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property . . . ." *Id.* at 80-81. "This definition has stood unchanged and unmodified since *Rigney* was decided." *Citizens Utilities Co. v. Metropolitan Sanitary District*, 25 Ill. App. 3d 252, 256, 322 N.E.2d 857, 861 (1974). And this test for damagings has been specifically applied to zoning restrictions as well. See *Equity Associates, Inc. v. Village of Northbrook*, 171 Ill. App. 3d 115, 121-22, 524 N.E.2d 1119, 1124 (1988).

Thus, to adjudicate respondents' claims the district court needed only to apply well-settled Illinois law to the facts of this case. That task does not require *Pullman* abstention; indeed it is a routine undertaking for federal courts in diversity cases.[10]

Burford abstention requires dismissal of an action "only if it presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' or

[10] In all events, *Pullman* abstention would not provide a basis to affirm the judgment below remanding the entire case to state court. Under *Pullman* a federal court does not abdicate jurisdiction over the federal claims before it, but instead provides the plaintiff with "a reasonable opportunity to bring appropriate proceedings in the [state] courts, meanwhile retaining its own jurisdiction of the case." *Harrison v. NAACP*, 360 U.S. 167, 179 (1959); accord, *e.g.*, *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976); *Harris County Commissioners Court*, 420 U.S. at 83-84. Thus *Pullman* abstention does not divest a party of its right to a federal forum if the state court's decision does not obviate the need to decide a federal question. See *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-16 (1964). *Pullman* abstention provides "only [a] postponement of decision for its best fruition." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959). See also Pet. Br. 46 & n.28.

if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Quackenbush*, 116 S. Ct. at 1726 (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)). Neither prong of this test is satisfied here; as we explain above, there are no difficult questions of state law in this case, and for that very reason state policy in this area is clear. *Burford* abstention is rarely if ever appropriate when "state law appears to be settled." *Colorado River*, 424 U.S. at 815. See also *Quackenbush*, 116 S. Ct. at 1728, *id.* at 1729 (Kennedy, J., concurring). In the cases on which respondents rely, intricate state regulatory schemes were at stake in which review was committed to an identified set of state courts so that judges with special expertise could hear such cases. See *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 348 (1951); *Burford*, 319 U.S. at 326-27. Here, in contrast, Illinois law permits any court of general jurisdiction in the county to review an administrative decision (see 735 ILCS para. 5/3-104), and the legal claims at issue are not part of a highly technical regulatory scheme but instead involve long-settled and not particularly complicated principles of state law.

To be sure, the Landmarks Ordinance reflects local concerns, but that fact alone does not warrant abstention, as the Court made quite plain in *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959). There, the Court was asked to decide an issue of quintessentially local concern also involving the scope of governmental power over land use planning—the reach of eminent domain powers. The Court explained that "the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty." *Id.* at 191-92. Accord *Meredith v. City of Winter Haven*, 320 U.S. 228, 236-37

(1943). Respondents' contrary view would expand *Burford* abstention to reach the whole of state administrative law since there will always be some significant governmental policy to point to whenever a state or local government has taken the trouble of establishing an administrative enforcement system to address a particular concern. If that were enough to require abstention, nonresident litigants seeking to contest a state administrative decision would never be able to claim the federal jurisdiction Congress provided in the diversity statute, but would instead be remitted to potentially unfriendly state courts in the precise circumstance in which the diversity statute was intended to operate.

It is also far from clear that respondents, as private parties, are the proper parties to make a claim for *Burford* abstention. To justify *Burford* abstention, respondents must rely on the City's interests in controlling land use planning unrestrained by federal interference. See Resp. Br. 30-33. But these interests are the City's, not respondents', and the City's decision to forgo abstention and litigate this matter in federal court should be controlling. As the Court explained in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), when rejecting abstention in favor of a pending state proceeding under *Younger v. Harris*, 401 U.S. 37 (1971), "[i]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." 431 U.S. at 479. Accord *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978).

For all these reasons, the Court could easily reject respondents' abstention arguments. Indeed because respondents did not raise those arguments below, this Court is without the benefit of the views of the lower courts on whether respondents have in fact raised important and unsettled questions better left to the state courts. Of course, had respondents raised abstention below, the court of appeals might not have remanded the case to state court even if it had deemed abstention appropriate. Since respondents

press only questions of law, the court of appeals could have certified questions to the Illinois Supreme Court, as its rules permit. See Ill. Sup. Ct. R. 20. This Court has found certification to be an appropriate alternative to abstention when state law is uncertain and certification is available. See *Lehman Brothers v. Schein*, 416 U.S. 386, 389-91 (1974). Thus the propriety and mode of abstention is best left for the consideration of the court of appeals in the first instance on remand, as is the Court's usual practice with arguments not yet reached by a court of appeals. See, *e.g.*, *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 864-65 (1987); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 181-82 (1976). Certainly, at this juncture, abstention provides no basis to affirm the judgment below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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(C)

No. 96-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

vs.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL TRUST FOR HISTORIC PRESERVATION, NATIONAL ALLIANCE OF PRESERVATION COMMISSIONS, AND LANDMARKS PRESERVATION COUNCIL OF ILLINOIS SUPPORTING PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-910

CITY OF CHICAGO, *et al.*,
Petitioners,

vs.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL TRUST FOR HISTORIC PRESERVATION, NATIONAL ALLIANCE OF PRESERVATION COMMISSIONS, AND LANDMARKS PRESERVATION COUNCIL OF ILLINOIS SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE[1]

Amici Curiae have a direct interest in the Court's determination whether state and local administrative boards and agencies, when faced with combined federal and state claims filed against them in state court, will have the option of removing those cases to federal court.

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[1]The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or part and that no person or entity, other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of the brief.

The National Trust for Historic Preservation in the United States is a private, non-profit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 16 U.S.C. §§ 461, 468. With the support of its 275,000 members, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust has seven regional and field offices around the country.

The National Trust's expertise in historic preservation law is widely known; the Trust has participated in more than one hundred historic preservation cases during the past twenty-five years. Through its Legal Defense Fund, the National Trust advocates to secure judicial, administrative, and legislative decisions that uphold the validity and effectiveness of regulatory protections for historic properties and land-use regulations in general. The National Trust has participated as *amicus curiae* in ten Supreme Court cases involving challenges to local government land use regulatory authority under the United States Constitution. In addition, the National Trust has participated in a number of federal and state court cases around the country in which local historic preservation board decisions have been challenged on constitutional grounds. The National Trust is also active in historic preservation litigation where state administrative law claims are heard in federal and state courts.

The National Alliance of Preservation Commissions ("Alliance") is a non-profit public interest corporation established by a network of local preservation commissions in 1983. The Alliance's mission is to encourage architectural, cultural, and historic preservation in the United States by providing technical assistance to and advocating for local preservation commissions. The Alliance has 682 members in all 50 States, Puerto Rico, and the Virgin Islands, including 289 preservation commissions. In addition to its membership, the

Alliance regularly communicates with more than 2,000 preservation commissions nationwide.

The Landmarks Preservation Council of Illinois ("LPCI") is an Illinois not-for-profit corporation and voluntary membership organization founded in 1971. LPCI is located in the city of Chicago and has approximately 2,000 members throughout the state of Illinois. LPCI's members pay dues which go toward supporting LPCI's efforts to encourage landmark preservation throughout the state. LPCI's primary purpose is to promote public appreciation and continued use of landmark buildings through various means, including active participation in public hearings on landmark designation issues and other efforts to increase the public awareness of landmark preservation. Because of its efforts to support landmark preservation in the state of Illinois, LPCI has an interest in the outcome of this particular litigation and in its implications for landmarks litigation in general.

Amici believe they can assist the Court's consideration of the nature and scope of the removal statute. *Amici* have direct experience in helping local governments to defend cases, brought in state courts against local administrative boards regulating historic preservation and land use, that raise federal claims. *Amici* can therefore provide a national perspective on the importance of preserving access to a federal forum for local administrative board defendants.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision, in effect, prevents defendants in state administrative law cases that require on-the-record review from ever having the opportunity to have *federal* claims heard in federal court. That decision does not comport with the plain language of the removal statute. Nor is it consistent with

Congress's intent and policy choice in enacting that provision. In reaching this extraordinary result, the court of appeals disregarded the fundamental premise underlying the removal statute: that defendants should have the same opportunity as plaintiffs to choose to have federal claims heard in a federal forum.

1. Strong policies underlie Congress's decision to create removal jurisdiction: The federal forum often is the best place to have federal claims heard because federal courts offer the advantage of federal law expertise, uniformity and consistency in decision making, insulation from local influence, and have greater resources at their disposal. These considerations are especially pertinent in cases involving challenges to historic preservation and land use regulatory actions. Such cases often raise novel, complicated federal constitutional questions that benefit from the expertise, knowledge, and resources of federal courts.

2. The court of appeals was wrong in concluding that actions involving on-the-record review of state administrative agency decisions are not "civil actions" within the plain meaning of the removal statute. The plain meaning of "civil action" clearly encompasses review of state agency action. The Administrative Procedure Act confirms that Congress intended that review of administrative actions belongs within the federal question jurisdiction of federal courts. Thus, a garden-variety federal administrative law case plainly is a "civil action" even though it requires the court to show deference to the agency record. There is no legal basis for the conclusion that removal jurisdiction should turn on whether the federal court's review is of a state, rather than a federal, agency's action. Congress weighed in on this question by enacting the Individuals with Disabilities Education Act, which provides for deferential review of *state* administrative agency action in federal court. This enactment confirms that Congress intended the term "civil

action" to include deferential review of state administrative action.

Congress created no exception to removal jurisdiction for state administrative law claims, as it has done expressly for other types of claims. Nor would there be any basis for judicial creation of such an exception. It is axiomatic that when Congress has chosen not to create an express exception to a particular rule, the courts are not free to create one themselves.

Even if the court of appeals were correct that the state administrative law claims could not be heard in federal court, there would be no justification for its ruling that the entire case, including the federal law claims, could not be heard in federal court. The court relied on *dicta* from an Eleventh Amendment case that had no application to this case and was itself wrongly decided. Nothing in this Court's jurisprudence compelled the Seventh Circuit's conclusion that federal jurisdiction over federal claims is destroyed when the federal claims are combined with state law claims that cannot themselves be heard in federal court. To the contrary, federal courts have a fundamental obligation to exercise federal jurisdiction over federal claims.

The Seventh Circuit's decision should be reversed.

ARGUMENT

I. HISTORIC PRESERVATION BOARDS AND OTHER LOCAL ADMINISTRATIVE AGENCIES HAVE A SUBSTANTIAL INTEREST IN ACCESS TO A FEDERAL FORUM TO DEFEND FEDERAL CONSTITUTIONAL CLAIMS.

It is important at the outset to be clear about what is at stake in this case. The Seventh Circuit held that the City had no right to remove to federal court a state-court lawsuit, which included

claims that two municipal ordinances, on their face and as applied to respondents, violated the takings, equal protection, and due process clauses of the Fourteenth Amendment. The court reasoned that respondents had immunized these federal constitutional claims from adjudication in federal court by including in their complaint a request for administrative review under state law of the actions of Chicago's Landmarks Commission. In so doing, the court ruled in effect that one category of defendants -- state and local agencies involved in cases that include "deferential" state administrative review claims -- should be denied the right to choose to litigate related *federal* claims in *federal* court.

A. Removal Jurisdiction Reflects Congress's Recognition of the Important Policy Reasons Why A Federal Forum Should be Available to Defendants.

Fundamental to the laws governing federal jurisdiction is the principle that either party in a case may choose to litigate a federal claim in a federal forum. A plaintiff, of course, can choose to file a case in federal court, as long as at least some of the claims are based on federal law. A *defendant*, in turn, can remove a federal case to federal court even where the plaintiff has chosen to file in state court. 28 U.S.C. § 1441.[2]

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[2] *See* Erwin Chermerinsky, *Federal Jurisdiction* § 5.5, at 286 (1989) ("The existence of removal jurisdiction reflects the belief that both the plaintiff and the defendant should have the opportunity to benefit from the availability of a federal forum."). A non-diverse plaintiff, of course, can choose to preclude federal jurisdiction by raising no claims that arise under federal law. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936); *see also Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918) ("[T]he plaintiff may by the allegations of his complaint determine the status with respect to removability."); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("The [well-pleaded complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.") (footnote omitted).

Congress gave defendants the right to remove cases to federal court when such cases include federal claims because, in hearing federal claims, federal courts can provide particular advantages of judicial expertise, economy, uniformity, and expediency in decision making. For these reasons, a defendant facing federal claims will often have a real interest in being able to bring the case into a federal tribunal. *See* Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977).

First, federal courts have greater expertise in handling questions of federal law. Their familiarity with federal legal issues increases the likelihood that they will render a correct decision. *See* Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 159 (1953); *see also* Neuborne, *supra*, at 1121-24.

Second, and related to the issue of expertise, is the ability of federal courts to ensure uniformity and consistency in their decision making. Congress designed the federal court system to create greater uniformity in interpretation of federal law than would be provided by a multiplicity of state court systems. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 373 & n.9 (1992) (one rationale for federal question jurisdiction "is the need for uniform interpretation and application of federal law") (citing J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 2.3, at 15 (1985)); *cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (consistency and uniformity is a compelling justification for supremacy of federal law).

Because state courts hear fewer actions raising claims of federal statutory or constitutional law, they are more likely to adopt an approach that is out of step with holdings on comparable issues decided elsewhere. Moreover, when state courts do address federal questions, the only mechanism ensuring uniformity and consistency is this Court's certiorari

jurisdiction. Given the number of state court cases applying federal law and the independent and adequate state ground doctrine, which can insulate state court interpretations of federal law from further review,[3] this Court's appellate review of state decisions cannot ensure uniformity among the fifty state supreme courts in the same way that federal circuit courts can ensure that federal law is correctly and consistently applied in the district courts.

Third, the option of removing an action to federal court protects the litigants' rights to have cases heard free from local influence. This Court has specifically recognized that the creation of federal question jurisdiction was motivated by a desire to protect federal rights from the vagaries of some state courts. *See Haring v. Prosise*, 462 U.S. 306, 323 (1983); *Patsy v. Board of Regents*, 457 U.S. 496, 505 (1982). Such concerns also informed Congress's creation of the removal statute. *See, e.g., Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 341 (1976) (noting the accepted belief that Congress enacted the removal statute to "prevent prejudice in local courts"); *see generally* Neal Miller, *supra*, at 409-10.

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[3] *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Because state supreme courts can rest their decisions on adequate and independent state law grounds, state courts are free to construe federal law while still shielding their decisions from appellate review. This anomalous situation is illustrated by the case of *First Covenant Church v. City of Seattle*, 787 P.2d 1352 (Wash. 1990), *vacated and remanded*, 499 U.S. 901 (1991). In *First Covenant*, the Washington Supreme Court decision held that a landmarks preservation statute violated the Free Exercise Clause as applied to a church. This ruling was vacated and remanded by this Court in light of an intervening decision. On remand, the court went to great lengths to distinguish the federal law precedent, but it ultimately rested its decision to reinstate its prior decision on an adequate and independent state constitutional ground, even though it clearly conflicted with binding federal precedent. *First Covenant Church v. City of Seattle* (*First Covenant II*), 840 P.2d 174, 228 (Wash. 1992) (en banc). In such cases, where a complaint on its face pleads violations of federal law, allowing a plaintiff's case to retreat to state law nullifies federal review and frustrates efforts to bring uniformity to interpretations of federal law.

The federal courts, being more insulated from such local interests by lifetime tenure and presidential appointment, can better ensure decisions untainted by potential prejudice against rights protected by federal law. *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 234 (1948) ("[T]he reason for providing the initial federal forum is the fear that state courts will view the federal right ungenerously."); *cf.* Neal Miller, *supra*, 41 Am. U. L. Rev. at 435 (empirical findings that fear of local bias is a significant factor when attorneys choose to remove federal questions to federal court). In contrast, state court judges are often elected, meaning that they tend to be more responsive to dominant local interests.

Fourth, the federal courts may be more expeditious in decision making. Most state courts have lagged behind federal courts in developing and applying comprehensive programs for increasing the speed and efficient administration of their civil dockets. *See* Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 Stan. L. Rev. 1553, 1553 (1994) (citing differences in the resources federal courts have at their disposal in comparison with state court systems).

B. Removal Jurisdiction Is Especially Important in Historic Preservation and Land Use Regulation Cases.

These policy considerations are particularly important in cases where the defendant is a historic preservation board, since the law in this area is specialized and the potential for inconsistent judicial decisions and undue influence may be stronger than in other types of cases. Thus, defendants in this category of cases have a special interest in preserving access to federal courts to adjudicate federal claims.

Because historic preservation has emerged as an area of local land use regulation primarily in the last three decades, there is less than the usual amount of authoritative guidance for state courts on how to decide constitutional issues of major consequence. Not until after 1978, when this Court upheld the constitutionality of New York City's historic preservation law against a regulatory takings claim in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), did historic preservation laws become as widespread as they are today.[4] As a result, reviewing courts often find there is little binding precedent in the context of historic preservation claims applying the takings clause,[5] vagueness doctrine,[6] the equal protection clause,[7] procedural and substantive due process,[8] the

[4] At that time, all 50 states and more than 500 municipalities had enacted historic preservation laws. *Penn Central*, 438 U.S. at 107 n.1 (citing National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976)). In the wake of *Penn Central*, the number of local historic preservation ordinances doubled by 1986 to more than 1,000, *see* Tersh Boasberg, Thomas A. Coughlin & Julia Hatch Miller, 1 *Historic Preservation Law & Taxation* § 7.01 (1986), and tripled by 1989 to 1,500. *See* American Planning Ass'n, *Responding to the Takings Challenge*, Planning Advisory Service Report No. 416, at 23 (R. Roddewig & C. Duerkson eds. 1989). Today that number has quadrupled to approximately 2,000. Survey by National Alliance of Preservation Comm'ns, U.S. Preservation Comm'n Identification Project Data Base, maintained by the Office of Preservation Servs., School of Envtl. Design, Univ. of Georgia (May 1996).

[5] *See, e.g., Penn Central*; *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

[6] *See, e.g., Maher*, 516 F.2d at 1062; *Mayes v. City of Dallas*, 747 F.2d 323, 325 (5th Cir. 1984); *Nadelson v. Township of Millburn*, 688 A.2d 672 (N.J. Super. Ct. Law Div. 1996); *U-Haul Co. of Eastern Missouri, Inc. v. City of St. Louis*, 855 S.W.2d 424 (Mo. Ct. App. 1993).

[7] *See, e.g., Estate of Tippett v. City of Miami*, 645 So. 2d 53, 537 (Fla. App. 1994) (Gersten, J., concurring); *Second Baptist Church v. Little Rock*

free exercise,[9] establishment[10] and/or free speech[11] clauses of the First Amendment, and federal statutes such as the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4.[12]

Because federal courts are more familiar with federal constitutional law, they may be better equipped to resolve such difficult federal claims when they arise in preservation disputes. Moreover, this familiarity makes it more likely that uniform and consistent decisions will be made, thereby helping to develop a coherent body of law in historic preservation that can be relied upon by other courts in individual cases.

Finally, concerns about local influence are particularly relevant to historic preservation and local land use regulation. The decisions of local historic preservation boards and other land use regulatory agencies by their nature can have a significant impact on particular parcels of real property. Thus, powerful local real estate and development interests, and political groups such as property rights organizations, may be aligned against the historic preservation board. In this case, for

Historic Dist. Comm'n, 732 S.W.2d 483, 486-87 (Ark. 1987).

[8] *See e.g., Maher*, 516 F.2d at 1059-62; *Metropolitan Dade County v. P.J. Birds, Inc.*, 654 So. 2d 170 (Fla. App. 1995).

[9] *See, e.g., St. Bartholomew's*, 914 F.2d at 354; *First Covenant II*, 840 P.2d 174 (Wash. 1992).

[10] *See, e.g., Alger v. City of Chicago*, 748 F. Supp. 617 (N.D. Ill. 1990).

[11] *See, e.g., Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175 (1st Cir. 1996); *Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir.), *cert. denied*, 117 S. Ct. 768 (1996); *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993); *Burke v. City of Charleston*, 893 F. Supp. 589 (D.S.C. 1995) .

[12] *See, e.g., City of Boerne v. Flores*, 73 F.3d 1352 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996) (argued Feb. 19, 1997).

example, a real estate developer entered into a partnership with the International College of Surgeons tc develop historic lakefront property into luxury condominiums. At stake are tens of millions of dollars. Pet. App. 28a-29a. In such a case, there is a potential for a local elected judge to feel pressure to find a way to allow the project to go forward. While it is not the case that state courts will necessarily succumb to such influences, it remains true that the federal court system was designed to protect against just this kind of risk. *See* Neuborne, *supra*, at 1127-28.

This does not mean, of course, that historic preservation boards and other similar defendants would *always* choose to remove cases including federal claims. In many cases, they may decide that there is no reason to bypass state court adjudication of the case, particularly in view of the state courts' familiarity with local law. Certainly, in cases where only state law is at issue, the state court is the correct and only forum. *See, e.g., United Artists Theater Circuit v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993) (state constitution construed in accordance with federal constitution presented only state law claims). And examples abound of state court decisions where issues of state and federal law were effectively and correctly resolved in state court. *See, e.g., Teachers Ins. & Annuity Ass'n v. City of New York*, 623 N.E.2d 526 (N.Y. 1993); *383 Madison Assocs. v. City of New York*, 598 N.Y.S.2d 180 (App. Div. 1993), *cert. denied*, 511 U.S. 1081 (1994); *Estate of Tippett v. City of Miami*, 645 So. 2d 533 (Fla. App. 1994).

Petitioners, like other defendants, should have the choice of the federal forum. As we show in the next section, there is no evidence that Congress decided otherwise.

II. A LAWSUIT THAT INCLUDES BOTH FEDERAL CLAIMS AND STATE LAW CLAIMS SEEKING ON-THE-RECORD REVIEW OF STATE ADMINISTRATIVE ACTION IS A "CIVIL ACTION" OVER WHICH THE FEDERAL DISTRICT COURTS HAVE ORIGINAL JURISDICTION FOR PURPOSES OF REMOVAL.

Under 28 U.S.C. § 1441(a), a defendant may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." The Seventh Circuit held that this provision did not apply to this case, because the complaint filed in state court included requests for administrative review under state law based solely on the administrative record, and thus did not constitute a "civil action." That conclusion was plainly wrong.

It is useful to begin by noting what the Seventh Circuit did not hold. The court of appeals did not dispute that a "civil action . . . of which the district courts . . . have original jurisdiction" can include an action in which federal claims are paired with related state-law claims. Nor could it. The federal claims in such a case are covered by the grant of "federal question" jurisdiction in 28 U.S.C. § 1331, while the state claims are also cognizable in federal court under the grant of "supplemental" jurisdiction in 28 U.S.C. § 1367.

The Seventh Circuit also acknowledged that the term "civil action . . . of which the district courts . . . have original jurisdiction" can include a state-court suit challenging the actions of a state or local administrative agency, as long as there is some basis for federal jurisdiction, such as diversity of citizenship or a federal question. Pet. App. 11a (citing *Chicago, Rock Island & Pacific Railroad v. Stude*, 346 U.S. 574 (1954), and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1967)). This, too, is an entirely uncontroversial proposition. Indeed, it is one of the principal functions of

federal courts to bring state and local agencies into conformity with federal, and sometimes state, law.

The sole basis for the Seventh Circuit's ruling was the specific nature of the state-law claims pled in the original state-court actions -- the fact that they constituted requests for review of administrative actions *based on the administrative record*. Focusing on the fact that the trial court could not receive new evidence and make its own findings of fact, the court characterized this kind of action as one involving "appellate" review. This conclusion is wrong for several reasons.

A. The Entire Case Is a "Civil Action" That Can Appropriately Be Heard in Federal Court.

First, Congress had no intention of barring any part of this type of case -- including the state administrative review claims filed under state law and requiring deference to the agency action -- from being heard in federal court. It used a statutory term, "civil action," that is very broad and inclusive. "Civil action," in turn, was derived from the terms "suit of a civil nature" and "civil suit," which appeared in the predecessor removal statute.[13] "Suits of a civil nature, at law or in equity" referred to any kind of suit that was not criminal. *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 270-71 (1935) (phrase "suits of a civil nature" in original jurisdiction statute, 28 U.S.C. § 41(1) (1940), "is used in contradistinction to 'crimes and offenses'"). There is thus every reason, based on the statutory language alone, to conclude that Congress intended the scope of the removal statute to be broadly interpreted.

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[13] *See* 28 U.S.C. §1441 note ("Phrases [in § 1441] such as 'in suits of a civil nature, at law or in equity,' and the words, 'case,' 'cause,' 'suit,' and the like have been omitted and the words 'civil action' substituted in harmony with . . . the Federal Rules of Civil Procedure.").

More specifically, use of the same term elsewhere in the United States Code undermines any suggestion that Congress did not consider suits seeking on-the-record administrative review to be "civil actions." In *Califano v. Sanders*, 430 U.S. 99 (1977), for example, this Court analyzed the jurisdictional basis of administrative review claims filed in federal court against *federal* agencies. The Court held that the Administrative Procedure Act is not a separate grant of federal jurisdiction and that jurisdiction over such claims instead is based on the general federal-question provision, 28 U.S.C. § 1331, which applies only to "civil actions arising under the Constitution, laws, or treaties of the United States." *See* 430 U.S. at 106 (stating that the "expansion of § 1331," coupled with a separate provision limiting review of agency action, "apparently expresses Congress' view of the desired contours of federal-question jurisdiction over agency action"). *Califano v. Sanders* thus stands for the proposition that lawsuits seeking review of administrative agency actions are "civil actions."

This is particularly significant because federal district court suits challenging federal agency actions typically are governed by a deferential standard of review requiring the court to look only at the administrative record[14] -- precisely the characteristic that led the Seventh Circuit to exclude this case from the category of "civil actions."

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[14] *See Camp v. Pitts*, 411 U.S. 138, 141-42 (1973) (per curiam); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). A number of other federal statutes, like section 205(g) of the Social Security Act at issue in *Califano v. Sanders*, premise district court review of federal agency actions on deference to the agency record. *See* 49 U.S.C. § 11705(d) (Interstate Commerce Commission reparation orders); 7 U.S.C. §§ 210(f), 499g(b) (Secretary of Agriculture decisions under the Packers and Stockyards Act and the Perishable Commodities Act). This "group of federal statutes provides for enforcement in an original--as distinguished from an appellate--action in a United States district court." Walter Gellhorn, Clark Byse, *et al.*, *Administrative Law* 986 (8th ed. 1987).

In reaching that conclusion, the Seventh Circuit relied primarily on language in this Court's decisions in *Stude* and *Horton*. In both of those cases, however, the Court *upheld* federal jurisdiction to hear claims seeking administrative review of state agency actions. *See Stude*, 346 U.S. at 578-79 (a perfected appeal of a state administrative decision is "in its nature a civil action and subject to removal by the defendant to the United States District Court" (citing *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 407 (1878)). Moreover, since state law in both cases called for *de novo* review, the Court had no occasion to determine whether a more deferential standard of review would have changed the outcome. The statements cited by the Seventh Circuit are thus pure *dicta*, and furthermore do not explain *why* a deferential standard of review could prevent the treatment of state administrative review actions as "civil actions," when precisely the opposite rule applies to comparable actions seeking review of federal agency decisions.

Certainly it is hard to see how the identity of the agency defendant -- local, state or federal -- is relevant to whether a case is a "civil action." Indeed, here again, Congress has taken the opposite view in another statute. In the Individuals with Disabilities Education Act (hereinafter "IDEA"), Congress authorized on-the-record administrative review of *state* agency action, in federal court, as a "civil action" within federal jurisdiction. 20 U.S.C. § 1415(e).

Under the IDEA, the federal government funds state efforts to give individualized educational opportunities to students with disabilities in public schools. The Act provides that parents and school officials should work together to determine how best to further the student's educational development through an "individualized educational program" (hereinafter "IEP"). If parents are dissatisfied with the program developed by those officials, they may petition the school for a due process hearing and may appeal that decision to the state educational agency.

Id. § 1415(c). Thereafter, "[a]ny party aggrieved by the findings and decision" made by the state agency "shall have the right to bring a *civil action* . . . in any State court of competent jurisdiction *or in a district court of the United States* without regard to the amount in controversy." *Id.* § 1415(e)(2) (emphasis added).

With respect to the standard of review, the IDEA provides: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.* In *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court interpreted the statute as requiring reviewing courts to give substantial deference to the state agency's prior action:

> [T]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to the compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Id. at 206. The Court held that a state decision must be upheld if it is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-07.

Since Congress, in the IDEA itself, labeled such administrative review actions involving a deferential standard as "civil actions," it is not surprising that several courts have held that section 1441 authorizes removal of an IDEA administrative review action from state to federal court. *See Fayetteville Perry Local Sch. Dist. v. Reckers*, 892 F. Supp. 193, 199 (S.D. Ohio 1995); *Colin K. v. Schmidt*, 528 F. Supp. 355, 359 (D.R.I. 1981); *cf. Amelia County Sch. Bd. v. Virginia Bd. of Educ.*, 661 F. Supp. 889, 895 (E.D. Va. 1987) (case remanded because challenge to IEP arose under state, not federal law). There is no reason to adopt a different interpretation of section 1441 here, where the federal claims asserted against a local agency are based on the U.S. Constitution.

To the extent that the decision below was based on some perception, albeit unexplained, that it would be inappropriate to allow defendants to bring on-the-record state administrative review claims into federal court even when they are intertwined with federal claims,[15] that is a determination that should be left to Congress. It is, of course, the province of Congress to control the boundaries of federal court jurisdiction. U.S. Const. art. III, § 1; *see Palmore v. United States*, 411 U.S. 389, 401 (1973). And Congress certainly has acted to limit removal jurisdiction for specific types of claims when it has seen a need to do so. *See* 28 U.S.C. § 1445 (nonremovable actions include: FELA actions; civil actions against carriers for damages involving shipments; workmen's compensation cases; and civil actions arising under the Violence Against Women Act of 1994.); *id.* § 1341 (barring removal of civil actions to enjoin state tax determinations); *id.* § 1342 (barring removal of civil actions to enjoin state rates and tariffs). This is thus an appropriate case for application of the principle that, when

[15]Such a perception would be difficult to defend in light of the fact that federal courts are authorized to give deferential review of federal agency actions and *de novo* review of state agency actions. *See* pp. 14-17 *supra*.

Congress has spoken, its intent is "conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

There are, to be sure, non-statutory limitations on federal jurisdiction that this Court has recognized. But the list of recognized exceptions numbers only two: probate cases, *see Byers v. McAuley*, 149 U.S. 608, 615 (1893); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); *Markham v. Allen*, 326 U.S. 490 (1946), and domestic relations cases. *See Barber v. Barber*, 21 How. 582, 584 (1858); *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930).[16] These historical exceptions were based on the belief that the English courts of chancery -- the English analog to American courts' equity jurisdiction -- did not have jurisdiction over probate, which was "the distinctive function[] of the ecclesiastical courts in England." Paul M. Bator, *et al.*, *Hart & Wechsler's The Federal Courts and The Federal System* 1456 (3d ed. 1988). The exceptions arose during a time when the language of the diversity statute limited federal jurisdiction to "suits of a civil nature in law or in equity." *See* Judiciary Act of 1789, 1 Stat. 73 (codified at 28 U.S.C. § 41(1), recodified at 28 U.S.C. § 1345).

Moreover, it is essential to recognize that the domestic relations and probate exceptions apply only to the federal courts' *diversity* jurisdiction. *See De La Rama v. De La Rama*, 201 U.S. 303, 307 (1906) (basing the domestic relations exception on the lack of diversity, because husband and wife by law cannot be diverse from one another). No exceptions can

[16]And even those categories have been circumscribed and their place in federal jurisdiction jurisprudence questioned by this Court in recent years. *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), makes crystal clear that the domestic relations exception to federal court jurisdiction is not found in either Article III of the Constitution or in an Act of Congress. *Id.* at 697.

exist with respect to federal question jurisdiction because Congress, and not the common law, defines the scope of federal question jurisdiction. *See Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

In sum, there is no basis for the argument that the federal courts lack the authority to take cognizance of an entire case like this one, involving federal constitutional claims intertwined with state administrative claims requiring deferential review.

B. At a Minimum, the District Court Had the Authority to Retain Jurisdiction Over the Federal Claims.

Even if there were some reason to foreclose federal courts from hearing "deferential" state administrative review claims, it still would make no sense to incorporate such a limitation into the definition of a civil action subject to removal under section 1441. The effect of such an interpretation, as this case illustrates, would be to prevent even the federal claims filed in a state court action from being brought into federal court. Congress cannot have so intended.

In deciding to remand the entire case -- including the federal claims -- back to the state courts, the court of appeals resorted to a questionable application of *dicta* from its own Eleventh Amendment jurisprudence. The court drew an analogy to *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 876 (1994), a case where the plaintiffs had brought suit in state court asserting federal claims for damages and injunctive relief against state officials in their official capacity. When the case was removed to federal court, the Seventh Circuit held that removal was not authorized by section 1441 because part of the case -- the claim for damages -- was barred from being heard in federal court under the Eleventh Amendment. It reasoned that "if even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, *or does not fit*

within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then as a consequence of § 1441(a), the whole action cannot be removed to federal court." Pet. App. 21a (quoting *Frances J.*, 19 F.3d at 341) (emphasis added).

Here, the Seventh Circuit extended the logic of *Frances J.* to actions seeking review of local administrative law decisions. Having held that the state-law claims could not be heard in federal court, it concluded that the entire case was not a "civil action" within the original jurisdiction of the federal courts and that even the federal claims were not removable. Whatever the merits of the *Frances J.* decision, the court of appeals was clearly wrong to extend the logic of that ruling to cases where, as here, the Eleventh Amendment is not implicated.[17]

If it reaches this issue, the Court should hold that *Frances J.* is wrong -- *i.e.*, that the removal statute authorizes removal of federal claims even when they are combined in a state court complaint with state-law claims that cannot be heard in federal court. This Court has recognized that, when a single federal complaint combines claims that are barred by the Eleventh Amendment with claims that are not, the federal court has jurisdiction and should only dismiss the barred claims. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120-21 (1984). As the Court put it in *Pennhurst*, "[a] federal

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[17]The court of appeals conceded, as it had to, that the Eleventh Amendment was not implicated in this case. It has long been settled by this Court that municipalities and counties are not protected by sovereign immunity and thus cases can be brought against them without violating the Eleventh Amendment. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890).

court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.* at 121.[18]

There is no reason to interpret section 1441 any differently. *See Kruse v. State of Hawaii*, 68 F.3d 331, 335 (9th Cir. 1995) (proper course is to remand barred claims to state court and retain non-barred claims); *Henry v. Metropolitan Sewer District*, 922 F.2d 332, 338 (6th Cir. 1990) (same); *see generally* Mitchell N. Berman, Note, *Removal and the Eleventh Amendment: The Case for District Court Remand Discretion to Avoid a Bifurcated Suit*, 92 Mich. L. Rev. 683, 707 (1993) (criticizing rationale of remanding all claims to state court).

It follows that, even accepting the Seventh Circuit's unsupported notion that the state claims in this case were not cognizable in federal court, the district court was right to retain the federal claims.[19] The court of appeals provided no real justification for ignoring one of the fundamental obligations of federal courts -- their "strict duty to exercise the jurisdiction

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[18]This is in accord with this Court's routine practice of allowing federal courts to hear federal question claims not barred by the Eleventh Amendment after barred claims are dismissed. *See Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Edelman v. Jordan*, 415 U.S. 651 (1974).

[19]*See Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). In *St. Bartholomew's*, state law administrative claims challenging a landmarks decision were filed in federal court along with federal constitutional claims under the takings and free exercise clauses. In *St. Bartholomew's*, the court appropriately decided that even if the state administrative law claims were barred from federal court (a conclusion the court did not reach) there was no reason not to exercise jurisdiction over the federal constitutional claims. 728 F. Supp. at 964 & n.12, 965 n.15.

that is conferred upon them by Congress." *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1720 (1996) (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976); *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 415 (1964); *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257 (1821)). There is no reason to think Congress intended to exclude the federal claims at issue here from resolution in a federal tribunal. That choice should be respected.

CONCLUSION

For the foregoing reasons, the Seventh Circuit's decision should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE STATE OF INDIANA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE STATE OF INDIANA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS*

Amicus—and all States—have strong interests in this case. The court of appeals' decision impedes States' ability to remove civil actions and restricts their litigation options in a manner that makes them inferior to all other litigants.

The Seventh Circuit embraced an all-or-nothing rule that prohibits removal of actions containing even a single claim that is outside the district court's original jurisdiction. The reasoning of the court of appeals—in this case and in other circuit precedent on which the decision below is based[1]—operates to foreclose State defendants from removing actions that contain claims barred by the Eleventh Amendment or the related doctrine of *Hans v. Louisiana*, 134 U.S. 1 (1890). The result is that district courts have jurisdiction over non-barred federal claims (and related state claims) filed originally in federal court, but lack removal jurisdiction over the identical claims filed in state court that a State defendant wants removed to a federal forum.

The decision below thus creates an interpretive anomaly. It restrictively construed the phrase "civil action . . . of which the district courts . . . have original jurisdiction" in the general removal statute, 28 U.S.C. § 1441(a), in stark contrast to the expansive construction given to the identical phrase in the supplemental-jurisdiction statute, 28 U.S.C. § 1367(a). This anomaly works a special hardship on State defendants' ability vis-à-vis other defendants to remove cases.

[1] *Gorka by Gorka v. Sullivan*, 82 F.3d 772 (7th Cir. 1996); *Smith v. Wisconsin Dep't of Agriculture*, 23 F.3d 1134 (7th Cir. 1994); *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 513 U.S. 876 (1994); *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994). In this case, the City of Chicago's petition for certiorari expressly urged that *Frances J.* be given plenary review. Pet. 18.

SUMMARY OF ARGUMENT

A civil action containing state claims can be removed to federal court if the same action could have been brought initially in federal court under its supplemental jurisdiction. In either case, the action would be within the district court's "original jurisdiction" and thus satisfy the requirements of both the removal and supplemental-jurisdiction statutes. 28 U.S.C. §§ 1367(a), 1441(a).

Civil actions containing claims barred by the Eleventh Amendment are also removable. Well-established precedent of this Court makes clear that the Eleventh Amendment is a jurisdictional bar only to claims. It does not foreclose jurisdiction over actions that include barred claims. Allowing removal of non-barred federal claims also treats State defendants similarly to other defendants that elect to have their federal claims heard in a federal forum.

ARGUMENT

A District Court's Jurisdiction Over a Removed Action Is Not Defeated by the Mere Presence of a Claim for Which There Is No Independent Basis for Federal Jurisdiction

The Seventh Circuit erroneously remanded Respondents' entire action on the ground that it contained a state claim for administrative review that was purportedly outside the district court's original jurisdiction. Even if the state claim were not independently cognizable in federal court, removal of the entire action should have been permitted. Under well-established principles of supplemental jurisdiction, the entire action could have been brought originally in federal court because Respondents' state claim is tied inextricably to their federal-question claims.

A. Removal jurisdiction lies over all related claims whenever one or more claims are removable under federal-question jurisdiction.

The supplemental-jurisdiction statute makes clear that a district court's undisputed jurisdiction over federal-question claims, 28 U.S.C. § 1331, extends to related state claims. "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III[.]" 28 U.S.C. § 1367(a).

Given that all of Respondents' claims would have been within the district court's federal-question or supplemental jurisdiction, the mere fact that the action was brought in state court does not deprive the district court of removal jurisdiction. Like its supplemental-jurisdiction counterpart, the removal statute authorizes federal jurisdiction over "any civil action . . . of which the district courts . . . have original jurisdiction." 28 U.S.C. § 1441(a). *See* 1A James W. Moore, MOORE'S FEDERAL PRACTICE ¶ 0.160[6] at 246 (2d ed. 1996) ("If a federal question claim is pleaded, under § 1367(a), the district courts would have original supplemental jurisdiction over any state law claims that the plaintiff may have . . . . Therefore, if an action including both state and federal claims is brought originally in a state court, the district courts would also have supplemental removal jurisdiction under §1441(a).").

The Seventh Circuit's contrary holding was premised upon a flawed interpretation of the term "civil action." The court erroneously held that the Illinois lawsuit was not a removable "civil action" because it contained a state claim that the district court could not adjudicate independent of any

other grant of jurisdiction. "Under these circumstances, the case removed to the district court cannot be termed a 'civil action . . . of which the district courts . . . have original jurisdiction' within the meaning of section 1441(a)." *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 994 (1996), reprinted at Pet..22a.

The problem with the court's narrow interpretation of "civil action" under section 1441(a)—to consist only of cases in which all claims are entirely within the district court's original jurisdiction—lies in the troubling implications of similarly interpreting the identical provision under section 1367(a). Supplemental jurisdiction lies over related state claims if—and only if—there already exists a "civil action of which the district courts have original jurisdiction." 28 U.S.C. § 1367(a). That is, the exercise of supplemental jurisdiction presupposes a "civil action."

But, according to the theory of the decision below, a case "cannot be termed a 'civil action'" when a state claim is joined to federal claims in the same lawsuit because the state claim lacks an independent basis for federal jurisdiction. *International College of Surgeons*, 91 F.3d at 994 [Pet. 22a]. Thus, under the Seventh Circuit's reasoning, a federal court could never exercise supplemental jurisdiction over a state claim, no matter how related or integral to the accompanying federal claims, because the mere presence of the state claim would defeat the threshold requirement of a "civil action." This Court should reject the Seventh Circuit's implausible interpretation.

B. Civil actions containing claims barred by the Eleventh Amendment are likewise removable.

Nor is a district court's removal jurisdiction defeated when a civil action arising under federal law contains claims

barred by the Eleventh Amendment. This Court's settled precedent underscores that the Eleventh Amendment bars only particular claims against the State; it does not foreclose federal jurisdiction over whole cases that include such barred claims. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (*Pennhurst II*); *Alabama v. Pugh*, 438 U.S. 781 (1978).[2]

In *Pugh*, the Court dismissed claims against the State of Alabama and its board of corrections on Eleventh Amendment grounds, yet upheld the federal judgment against state officials sued in their individual capacities. *Id.* at 781-82. Because a federal court's lack of subject-matter jurisdiction cannot be waived, *Pugh* must stand for the proposition that the Eleventh Amendment represents a jurisdictional bar only to claims, not to entire cases that contain claims implicating the Eleventh Amendment. *See also Pennhurst II*, 465 U.S. at 121 ("A federal court must examine each *claim* in a case to see if the court's *jurisdiction over that claim* is barred by the Eleventh Amendment.") (emphasis added).

This precedent shows that civil actions containing non-barred federal claims may be removed or brought in federal court in the first instance, even though the district court must remand or dismiss the barred claims. Because civil actions containing non-barred claims are thus within the district court's "original jurisdiction," they are removable under section 1441(a) if brought initially in a state forum.

Neither the statute's text nor its legislative history supports the contrary result—adopted in some circuits[3]—that

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[2] *See generally* Mitchell N. Berman, Note, *Removal and the Eleventh Amendment: the Case for District Court Remand Discretion to Avoid a Bifurcated Suit*, 92 MICH. L. REV. 3 (1993).

[3] *See, e.g., Frances J.*, 19 F.3d 337; *McKay v. Boyd Constr. Co.*, 769 F.2d 1084 (5th Cir. 1985). *But see Kruse v. Hawaii*, 68 F.3d 331, 334 (9th Cir. 1995) (better rule is that "Eleventh Amendment bar against some of the claims of an action does not bar the removal of that action."); *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332 (6th Cir. 1990) (same).

a plaintiff can foreclose federal-question removal merely by joining a claim barred by the Eleventh Amendment. These decisions permit precisely the forum-shopping that section 1441 was designed to preclude, allowing plaintiffs who plead cleverly to bar removal by States. The decisions also place States in an inferior position to all other litigants in relation to removal by erecting a bar that applies to no other litigant.

It would be ironic if the amendment constitutionalizing state sovereign immunity in litigation prevented States from removing non-barred federal claims that the States want adjudicated in a federal forum. The very sovereignty protected by the Eleventh Amendment should not be compromised by restricting States' removal power as compared to all other litigants. Just as with other defendants, State defendants might prefer to have non-barred federal claims heard by federal courts, whose expertise and resources may be greater than state courts, and whose decisions are more likely to produce a uniform body of federal law, given that this Court rarely reviews state-court adjudications of federal law. The proper view of federalism places States on the same footing as other litigants and lets States choose whether to remove.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY, BUT IN SUPPORT OF REVERSAL OF THE DECISION BELOW

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QUESTION PRESENTED FOR REVIEW

Do federal district courts have supplemental claim jurisdiction to conduct record review of state law claims?

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Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of neither party, but in support of reversal of the decision below.[1] Both parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Fifth Amendment's Just Compensation Clause worthless. Defender has represented numerous property owners seeking to protect their constitutional rights in federal courts, and many of these property owners have faced substantial barriers to having their constitutional claims fully adjudicated in federal court.

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[1]No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* (its members or counsel) contributed financially to the preparation of this brief.

STATEMENT OF THE CASE

This case concerns the question of whether federal courts have supplemental claim jurisdiction under 28 U.S.C. § 1441 to hear state law claims involving record review of state administrative decisions.

This case grows out of Respondent's, the International College of Surgeons (the "College"), plans to demolish two buildings located on its property on Lake Shore Drive in Chicago. Those plans were thwarted because of the city's designation of the two buildings designated as historic landmarks. The city, in separate administrative hearings, denied both the College's demolition permit applications and applications for hardship exception under the Landmarks Ordinance. The College then filed separate record review challenges in state court alleging violations of both state and federal law in refusing to grant the permits or hardship exception. The College's federal law counts included constitutional claims that the city's decisions denied the College its due process rights under the Fifth and Fourteenth Amendments, violated its right to equal protection under the

Fourteenth Amendment, and constituted an uncompensated taking of property in violation of the Fifth and Fourteenth Amendments. The city removed the cases to federal court, where they were dismissed on the merits.

The Respondent challenged these dismissals, saying that the federal district court did not have jurisdiction to hear the state law claims, since the Illinois Administrative Review Law mandates that administrative decisions of state agencies be challenged on the administrative record with a deferential standard of review. Pet. App. 18a-19a. The College asserted that these state law claims thus do not constitute "civil actions" over which federal courts have jurisdiction pursuant to 28 U.S.C. § 1441. The United States Court of Appeals for the Seventh Circuit held that the removal of the state law claims was barred for this reason, and remanded the cases back to state court.

SUMMARY OF ARGUMENT

Under the decision of the court below, a plaintiff would be precluded from bringing both state and federal law claims in federal court if his state law claims would be

limited to record review in state court. Pet. App. at 22a. Plaintiffs seeking just compensation for the deprivation of their property rights already face substantial hurdles to having their claims heard in federal court. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). If these property owners are denied jurisdiction over supplemental state law claims merely because these claims call for record review of a state administrative decision, their access to the federal courts would be even further threatened.

This increased burden is unnecessary. No prior decisions of this Court mandate that federal courts decline jurisdiction over record review claims arising under state law. Moreover, 28 U.S.C. § 1367(c) already provides federal courts the power to decline jurisdiction over state law claims where federal adjudication would interfere with the sovereignty of state courts.

ARGUMENTS

I. THE DECISION OF THE COURT BELOW, IF UPHELD, WILL FURTHER INCREASE THE BARRIERS FACED BY PRIVATE PROPERTY OWNERS IN HAVING THEIR CLAIMS FOR JUST COMPENSATION HEARD IN FEDERAL COURT.

If the decision of the court below is upheld, property owners denied reasonable use of their property by state agency decisions would be left with a difficult and unpalatable choice: have their federal constitutional claims heard by a state court or forgo their state law claims should they choose a federal forum to pursue their lawsuit. A state or local government could effectively prevent federal courts from hearing claims for just compensation against them merely by limiting review of the agency decision in state court to the administrative record.

Property owners already face tremendous procedural hurdles to have their Fifth Amendment claims for just compensation heard based upon the stringent ripeness requirements imposed by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson County*, this Court held that

property owners seeking just compensation under the Fifth Amendment may not bring such a claim in federal court until they have sought, and been denied, compensation in state courts. *Id.* at 194.

Just compensation claims under the Fifth Amendment are the only type of federal constitutional claims where a plaintiff must first attempt to vindicate their rights in state court before a challenge can be heard in federal court. Indeed, "it is a basic constitutional principle that a federal court has a duty to review laws for constitutional infirmities. . . ." *Government Suppliers Consolidating Serv. v. Bayh*, 753 F. Supp. 739, 757 (S.D. Ind. 1990)(citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Plaintiffs seeking just compensation for state actions, however, do not receive the benefits of this "basic constitutional principle" unless they are prepared to spend many years exhausting administrative and state judicial remedies. The decision of the court below could have the effect of wiping out entirely the federal courts' duties to many landowners seeking just compensation under the Fifth Amendment.

The case of Richard and Ann Reahard provides an excellent example of the difficulty landowners face in having their just compensation claims adjudicated in federal court. The Reahards own property in Lee County, Florida that was designated a "resource protection area" by the county in 1984. Subsequently, the Reahards spent five years exhausting their administrative remedies. After being denied administrative relief, the Reahards filed a just compensation claim against the county in state court in 1989, but the county immediately had the case removed to federal court. After a tortured procedural history which involved a jury award twice being granted to the plaintiffs, the United States Court of Appeals for the Eleventh Circuit *sua sponte* concluded, citing *Williamson County*, that the case was not ripe for adjudication in federal court, and remanded the case back to the state court where it had originally been filed in 1989. *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1693 (1995). At present, the Reahards are still litigating their claim in state court, eight years after the case was originally filed. The lack of a federal forum for their lawsuit has left the Reahards still engaged in a legal

fight for constitutionally mandated just compensation thirteen years after the county's actions rendered their property virtually worthless.

During the current session, this Court has held a landowner's federal constitutional claims against a local government entity ripe for review in federal court. *Suitum v. Tahoe Reg'l Planning Agency*, 65 U.S.L.W. 4385 (U.S. May 27, 1997)(No. 96-243). Having already opened the doors of the federal courthouse to property owners in one case during this session, this Court should not help to shut them again by upholding the decision of the court below.

II. FEDERAL COURTS REGULARLY HEAR RECORD REVIEW CHALLENGES PURSUANT TO BOTH FEDERAL AND STATE LAW AND ALREADY POSSESS ABILITY UNDER 28 U.S.C. § 1367(c) TO REFUSE JURISDICTION OVER STATE LAW CLAIMS.

Federal district courts hear record review appeals on a regular basis through Administrative Procedure Act challenges to federal agency decisions. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)("The APA specifically contemplates judicial review on the basis of

the agency record. . . .") This Court has never held that federal courts are barred from similarly hearing record review appeals of state agency decisions. Moreover, there is no support in prior decisions of this Court for the novel theory, advanced by the court below, that record review challenges of state agency actions are not "civil actions" within the meaning of 28 U.S.C. § 1441. Essentially, Respondents are asking this Court to "write in" a new requirement for both federal removal and supplemental claim jurisdiction where such a provision clearly does not exist.

If a federal district court is concerned that adjudicating a state law claim would intrude on the independence and sovereignty of state courts, it is already empowered to refuse jurisdiction over those claims. 28 U.S.C. § 1367(c). Such situations, however, are relatively rare because Section 1367(c) sets forth clear requirements for federal courts to exercise this option. Accordingly, federal courts commonly hear claims involving issues of state law interpretation because the state law claims meet the criteria set forth in Section 1367(c).

CONCLUSION

The interests of property owners whose constitutional rights have been infringed by state agency decisions seeking to litigate their disputes in federal court will be harmed if this Court adopts the jurisdictional requirement advanced by Respondents. Accordingly, *amicus curiae* urges this Court to reverse the decision of the court below.

Respectfully submitted,

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